266 N.C. App.—No. 3 Pages 243-403

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 8, 2020

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 16 JULY 2019

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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Uniform Deployed Parents Custody and Visitation Act—claim for custodial responsibility—prior judicial order—no modification—In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), a prior custody order regarding the parties' daughter constituted a "prior judicial order designating custodial responsibility of a child in the event of deployment" (N.C.G.S. § 50A-373). Further, where the UDPCVA's standard for modifying prior custody orders was less stringent than the standard for modifying custody orders under Chapter 50 of the General Statutes, the trial court did not abuse its discretion by determining that the "circumstances required" no change to the prior order's provisions addressing caretaking or decision-making authority over the daughter. **Roybal v. Raulli, 318.**

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Uniform Deployed Parents Custody and Visitation Act—limited contact—non-parent—denied—In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court did not abuse its discretion by granting the stepmother "limited contact" with the parties' daughter on a shorter schedule than what the father was granted under a prior custody order. The prior order did not address granting limited contact to a non-parent with the daughter, so the trial court was not bound by that order when determining the amount of limited contact to grant the stepmother. **Roybal v. Raulli, 318.**

Uniform Deployed Parents Custody and Visitation Act—limited contact—non-parent—denied—In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court's order denying the stepmother "limited contact" with the parties' son was remanded because the trial court based its decision on a flawed interpretation of the UDPCVA and of a custody order previously entered in the case. Furthermore, the evidence showed that the son had a "close and substantial relationship" with his stepmother, and nothing in the trial court's order suggested that granting her limited contact would be contrary to the son's best interests (N.C.G.S. § 50A-375). **Roybal v. Raulli, 318.**

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Harassment—substantial emotional distress—text messages—no legitimate purpose—Defendant placed plaintiff in fear of continued harassment, rising to such a level as to inflict substantial emotional distress, where he sent her six text messages despite a court order that he have no contact with her as a result of his prolonged egregious behavior. Defendant had no custodial rights to the children, so his text messages allegedly concerning their children served no legitimate purpose. **Bunting v. Bunting, 243.**

Harassment—substantial emotional distress—text messages—sufficiency of evidence—terror and lifestyle alterations—There was sufficient evidence that defendant's text messages to plaintiff caused her substantial emotional distress where there was a long history of abuse by defendant and where plaintiff testified

a scenario in which an offense labeled as "carrying concealed weapon" could be a Class 1 misdemeanor (under a different statute), the parties stipulated that the applicable statute was N.C.G.S. § 14-269(c), which did not provide for any violation of its provisions to be classified as a Class 1 misdemeanor. **State v. Green, 382.**

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Interference with prospective economic advantage—Noerr-Pennington doctrine—applicability—A real estate company's claim for tortious interference with prospective economic advantage was not subject to the *Noerr-Pennington* doctrine—which provides immunity for certain petitioning activities undertaken by businesses, absent a bad faith motive to thwart competition—where the claim was not based on anti-competitive activities, since the parties were not competitors in the marketplace, and the complaint's allegations that defendants, owners of real property adjacent to a proposed development, made misrepresentations to a town

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

BUNTING v. BUNTING

[266 N.C. App. 243 (2019)]

CHRISTY KING BUNTING, PLAINTIFF
v.
MICHAEL JOE BUNTING, DEFENDANT

No. COA18-839

Filed 16 July 2019

1. Domestic Violence—harassment—substantial emotional distress—text messages—no legitimate purpose

Defendant placed plaintiff in fear of continued harassment, rising to such a level as to inflict substantial emotional distress, where he sent her six text messages despite a court order that he have no contact with her as a result of his prolonged egregious behavior. Defendant had no custodial rights to the children, so his text messages allegedly concerning their children served no legitimate purpose.

2. Domestic Violence—harassment—substantial emotional distress—text messages—sufficiency of evidence—terror and lifestyle alterations

There was sufficient evidence that defendant's text messages to plaintiff caused her substantial emotional distress where there was a long history of abuse by defendant and where plaintiff testified that defendant's repeated contact caused her to feel terror, to change her housing arrangements, and to alter her daily routine.

3. Domestic Violence—acts of domestic violence—support for conclusion of law—violation of no-contact order—text messages

The trial court's findings of fact supported its conclusion that defendant committed acts of domestic violence against plaintiff where there was a long history of domestic violence, including threats to kill plaintiff, and defendant violated a no-contact order by sending plaintiff six text messages that caused her to fear for her safety.

Appeal by Defendant from Order entered 24 January 2018 by Judge Brian DeSoto in Pitt County District Court. Heard in the Court of Appeals 13 February 2019.

No brief filed by Plaintiff-Appellee.

The Duke Law Firm NC, by W. Gregory Duke, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from entry of a Domestic Violence Protective Order. Defendant contends that the trial court erred by entering the Domestic Violence Protective Order because (1) text messages he sent to Plaintiff did not constitute harassment as the messages served a legitimate purpose; (2) there was no evidence that Plaintiff suffered from substantial emotional distress; and (3) the trial court's conclusion of law that Defendant committed acts of domestic violence was erroneous and not supported by adequate findings of fact. Defendant's arguments lack merit and we affirm.

I. Background and Procedural History

Plaintiff Christy King Bunting and Defendant Michael Joe Bunting were divorced in 2008 after ten years of marriage. Two children were born of the marriage.

There is a long and detailed history of domestic violence by Defendant against Plaintiff, with entry of multiple domestic violence protective orders ("DVPO") against Defendant, dating back to 2008. On 29 May 2008, the court entered an ex parte DVPO against Defendant which remained in effect until 9 June 2008. The court found that Defendant threatened to kill Plaintiff if she tried to take their children from him after Plaintiff told Defendant that she wanted a divorce. This DVPO allowed communications between Defendant and Plaintiff only if the communications concerned the welfare of their children and were communicated through a third party.

On 8 July 2008, the court entered a DVPO against Defendant which remained in effect until 29 May 2009. The court found that Defendant threatened to kill Plaintiff. This DVPO allowed communications between Defendant and Plaintiff only if the communications concerned the welfare of their children and were communicated through a third party. On or about 16 December 2008, Defendant and Plaintiff entered into a Consent Order which included provisions for custody of the children.

Plaintiff filed a Motion for Contempt Against Defendant for violating the 8 July 2008 DVPO,[1] which was heard on or about 23 June 2009. On or about 1 July 2009, Defendant was arrested and charged with violating the 8 July 2008 DVPO. Defendant's violations took place over the course

1. The Record on Appeal does not contain the motion, but does contain an Order Modifying Custody entered 31 January 2012 which makes findings of fact regarding this motion and the trial court's disposition of this motion.

of three days, from 5 May 2009 through 7 May 2009, during which time Defendant threatened Plaintiff and told Plaintiff, "I will kill you;" refused to return the oldest child to Plaintiff after Plaintiff allowed Defendant extra visitation with the child; called Plaintiff between 15-20 times and left voice messages for Plaintiff, cursing her and telling her that the children hated her; and kidnapped the youngest child, hid from the police for three days, and told Plaintiff she would not get the child back. On 2 July 2009, the court entered an Order for Contempt, granting Plaintiff's 23 June 2009 motion for contempt and advising Defendant that he could purge his contempt by, *inter alia*, "ceas[ing] and desist[ing] any and all future behavior that would constitute a violation of the Domestic Violence Protective Order."

On 26 August 2009, Defendant was found guilty of violating the 8 July 2008 DVPO which was in place at the date and time of his offenses on 5 May 2009 through 7 May 2009. The court again ordered Defendant to comply with the DVPO and not to assault or threaten Plaintiff. On 25 September 2009, the court issued an order denying Defendant's motion to return weapons surrendered under a domestic violence protective order.[2]

On 15 October 2009, the court entered a second Order for Contempt against Defendant. The court ordered Defendant to refrain from making derogatory comments about Plaintiff in the presence of the children and "to cease engaging in behaviors that have a negative impact on the emotional health of the children . . . ." The order further required Defendant to "immediately engage the services of a medical or psychological professional[,] . . . [and] to obtain counseling to aid him in dealing with [his] anger and frustration issues and in controlling his impulsive behavior."

On 27 January 2010, the court entered an *ex parte* DVPO against Defendant which remained in effect until 6 February 2010. The court found that Defendant "repeatedly sent voicemails to the [P]laintiff containing threatening language" and "threatened to shoot the [P]laintiff." The court also found that Defendant was "previously involuntarily committed . . . for threatening suicide." The court ordered Defendant to stay away from "any place the [P]laintiff is" and to stay away from the children's school. This order allowed communications between Defendant and Plaintiff only if the communications concerned the welfare of their children and were communicated through a third party.

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2. The court issued three subsequent orders denying Defendant's motions to return weapons surrendered under a domestic violence protective order on 1 May 2015, 15 May 2015, and 19 February 2016.

On 20 May 2010, the court entered a DVPO against Defendant which remained in effect until 26 January 2011. The court found that Defendant threatened to seriously injure or kill Plaintiff, and concluded that there was a danger of serious and immediate injury to Plaintiff. The court ordered Defendant to "comply fully with all prior custody orders between the parties." The court included an attachment which stated,

> Email or Text communication between the parties for the sole purposes of facilitating the exchange of the minor children, to share necesary information about the minor children, or in case of an emergency involving the minor children DOES NOT VIOLATE THE "NO CONTACT" PROVISION OF THE [DVPO]. Communication between the parties on any subject other than that of the minor children SHALL BE PROHIBITED AND DOES CONSTITUTE A VIOLATION OF THE "NO CONTACT" PROVISION.

The court further ordered the parties to communicate exclusively via email or text message, and banned the use of third parties, with the exception of their respective attorneys, to communicate with one another.

On 3 June 2010, Defendant was arrested and charged with violating the 20 May 2010 DVPO. On 16 June 2010, after Defendant committed another violation of the 20 May 2010 DVPO, a third Order for Contempt was entered against Defendant. The court found that Defendant "has continued to make derogatory comments about the Plaintiff or the Plaintiff's parenting skills in the presence of the minor children[,] . . . [and] has engaged in such harassment and behaviors that have caused the Plaintiff to fear for her personal safety and that of the children . . . ." On 15 September 2010, Defendant pled guilty to two violations of the DVPO and received an 18-month suspended sentence. Defendant was again ordered to comply with all terms and conditions of the DVPO then in place.

On 1 February 2011, the court renewed the DVPO against Defendant until 26 January 2012. The court added a provision which allowed Defendant to attend the children's school activities; however, the court reaffirmed the prohibition against Defendant having contact with Plaintiff at a school activity, and barred Defendant from speaking with or approaching the children at a school activity.

On 18 August 2011, Plaintiff filed a Motion to Modify Custody to Terminate or Require Defendant's Visitation to be Supervised. This motion was based on "Defendant's continued violation of this Court's orders and because of the ongoing psychological and emotional damage

to the minor children caused by the Defendant's behavior." Defendant, who was incarcerated at this time, requested two continuances and the court granted both. The court continued the hearing until 15 November 2011 and ordered Defendant to have no written or verbal contact with the children or with Plaintiff until the 15 November 2011 hearing. While incarcerated for violating the 1 February 2011 DVPO, Defendant continued to contact Plaintiff and the children. Defendant made phone calls to the children, and also sent numerous letters to the oldest child which referenced Plaintiff in a derogatory manner.

On 20 January 2012, the court entered an order renewing the DVPO against Defendant until 26 January 2013, finding that there was a felony DVPO violation pending in Superior Court.

On 31 January 2012, the court entered an Order Modifying Custody ("Custody Order") which contained 20 detailed findings of fact. The court found an extensive history of domestic violence by Defendant against Plaintiff. The court also found that "Defendant's behavior had caused the minor children to experience stress and anxiety[;]" that Defendant admitted that he talks to the children about their mother because "he thinks they need to know the truth about her[;]" and that Defendant thinks the children do not need therapy because therapy "just makes things worse."

The court further found that Defendant has acted in ways "to harass the Plaintiff, causing her significant emotional stress, and to negatively impact her relationship with the minor children and has engaged in a lengthy and persistent campaign to alienate the minor children from the Plaintiff." The court found that "Defendant has been repeatedly ordered by this Court to refrain from [his] actions and behavior[,] . . . he has completely ignored said orders and warnings[,] . . . and instead appears to have escalated said behavior and has on more than one occasion expressed his disdain for the orders of this court." The Custody Order required Defendant to complete a psychological evaluation and provide the results to the court; enroll in and complete counseling with a licensed therapist; and remain in therapy until such time as the therapist releases him from therapy and recommends that Defendant should be allowed to resume unsupervised visitation with the children.

The Custody Order granted Plaintiff sole legal and physical custody of the children, and allowed Defendant to have one, two-hour supervised visit per month with the children at The Family Center. It required The Family Center staff to supervise the exchange of the children at the visits so that Plaintiff would not have contact with Defendant. The Custody Order also included a no-contact provision (the "Provision")

which declared, "other than the two hours of supervised visitation with the minor children . . . the *Defendant shall have no written, verbal, telephonic, or electronic contact with the minor children or the Plaintiff*." (emphasis added)

On 11 January 2013, the court entered an order renewing the DVPO against Defendant until 20 January 2015. The court found that "there have been ongoing incidents since 2008 and a criminal matter [against Defendant] is set for 31 January 2013."

On 9 September 2015, the court entered an *ex parte* DVPO against Defendant which remained in effect until 19 September 2015. The court found that Defendant has a "significant DVPO violation history" and that "Defendant appears to be noncompliant with [the] custody order addressing contact with the Plaintiff." The court also found that Defendant threatened to use a deadly weapon against Plaintiff; made threats to seriously injure or kill Plaintiff; and made serious threats to commit suicide in the past. The court ordered Defendant to comply with the Custody Order.

On 2 October 2015, the court entered a DVPO against Defendant which remained in effect until 1 October 2016. The court ordered Defendant to have no contact with Plaintiff, except through an attorney, and specifically removed language from the order which would have allowed Defendant to communicate with Plaintiff if the communications regarded the welfare of the children. The court found that Defendant called Plaintiff several times and wrote Plaintiff a letter, in violation of the Custody Order. The court again ordered Defendant to comply with the Custody Order.

On 31 July 2017, Plaintiff filed a complaint and motion for a DVPO against Defendant alleging that he sent her six text messages, the texts were unsolicited and had become more frequent and accusatory in tone, the texts were in violation of the no-contact Provision in the Custody Order, and the text messages caused her distress, anxiety, and fear, in light of the "tortuous history" of abuse by Defendant against Plaintiff and their children. Upon review of Plaintiff's complaint and motion, the trial court entered an *ex parte* DVPO against Defendant. On 24 January 2018, following a hearing, the trial court entered a Domestic Violence Protective Order (the "Order"). From entry of the Order, Defendant appeals.

II. Discussion

On appeal, Defendant argues that (1) the six text messages he sent to Plaintiff did not constitute harassment because the text messages,

that discussed the children, served a legitimate purpose; (2) there was no evidence that Plaintiff suffered from substantial emotional distress; and (3) the trial court's conclusion of law that Defendant committed acts of domestic violence was erroneous and not supported by adequate findings of fact.

A. Standard of Review

"When the trial court sits without a jury regarding a DVPO, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal." *Kennedy v. Morgan*, 221 N.C. App. 219, 220-21, 726 S.E.2d 193, 195 (2012) (citation omitted). The trial court's "conclusions of law are reviewable *de novo* on appeal." *Wornstaff v. Wornstaff*, 179 N.C. App. 516, 520-21, 634 S.E.2d 567, 570 (2006) (quotation marks and citation omitted).

B. Domestic Violence Protective Orders

"Any person residing in this State may seek relief under . . . Chapter [50B] by filing a civil action or by filing a motion in any existing action filed under Chapter [50B] of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person." N.C. Gen. Stat. § 50B-2(a) (2018). " 'If the court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence.' " *Kennedy*, 221 N.C. App. at 221, 726 S.E.2d at 195 (quoting N.C. Gen. Stat. § 50B-3(a) (2011)). "Although N.C. Gen. Stat. § 50B-3(a) states that the trial court must 'find' that an act of domestic violence has occurred, in fact this is a conclusion of law[.]" *Id.* at 223 n.2, 726 S.E.2d at 196 n.2. Domestic violence is defined as "[p]lacing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in [N.C. Gen. Stat. §] 14-277.3A, that rises to such a level as to inflict substantial emotional distress . . . ." N.C. Gen. Stat. § 50B-1(a)(2) (2018).

C. Fear of Continued Harassment

[1] Defendant first argues that the six text messages he sent to Plaintiff did not place Plaintiff in fear of continued harassment because the text messages, that discussed the children, served a legitimate purpose. Defendant's argument is meritless.

Harassment is defined as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2) (2018). "The plain language of the statute requires the trial court to apply only a subjective test to determine if the aggrieved party was in actual fear; no inquiry is made as to whether such fear was objectively reasonable under the circumstances." *Wornstaff*, 179 N.C. App. at 518-19, 634 S.E.2d at 569. Defendant does not contest that the texts he sent Plaintiff were (1) knowing; (2) directed at Plaintiff; and (3) tormented, terrorized, or terrified Plaintiff. Defendant does argue that the text messages served a legitimate purpose. Whether conduct served a legitimate purpose is a factual inquiry. *See State v. Wooten*, 206 N.C. App. 494, 501, 696 S.E.2d 570, 575-76 (2010) (examining the circumstances surrounding faxes defendant sent the victim and concluding that, despite defendant's contention that the faxes were sent in reply to correspondence from public officials, the communications served no legitimate purpose).

From 2007 through 2012, Plaintiff obtained four DVPOs against Defendant. Plaintiff renewed those four DVPOs when allowed, and obtained new DVPOs when the original orders and their renewals expired. Throughout this time period, Defendant repeatedly violated the DVPOs in numerous ways, including by contacting Plaintiff via phone calls, emails, text messages, and by showing up in-person. Prior to entry of the Custody Order, Defendant was permitted to contact Plaintiff if the communications were in regard to their children. However, over the course of five years, Defendant violated the various protective orders and restrictions on his contact, and was held in contempt for refusing to obey court orders.

In 2012, after Defendant committed additional violations of the DVPO that was in place at the time, Plaintiff was granted sole legal and physical custody of the children. The Custody Order and no-contact Provision prohibited Defendant from contacting Plaintiff in any manner, and prohibited Defendant from contacting the children in any manner outside of the one, two-hour supervised visit per month. Further, the court found that Defendant "disregarded all Orders of this Court. . . [and] has been repeatedly ordered by the Court to refrain from the actions and behaviors in which he has continued to engage[.]" The court also found that Defendant "has completely ignored said orders and warnings and the recommendations of the [child's psychologist], and instead appears to have escalated said behavior and has on more than one occasion expressed his disdain for the orders of this court."

As Defendant was under a court order to have no contact with Plaintiff as a result of his prolonged egregious behavior, and because Defendant had no custody of the children, Defendant's text messages to Plaintiff allegedly concerning their children were in direct violation of the court's order and did not serve a legitimate purpose. *See Wooten*, 206 N.C. App at 501, 696 S.E.2d at 575-76; *see also Stancill v. Stancill*, 241 N.C. App. 529, 542-43, 773 S.E.2d 890, 899 (2015) (concluding that defendant's text messages to plaintiff regarding aggressive negotiations of a shared property settlement were not for a legitimate purpose and amounted to harassment). Defendant's argument is overruled.

D. Emotional Distress

[2] Defendant next argues that there was no evidence that Plaintiff suffered from substantial emotional distress as a result of the six text messages, and thus there was no competent evidence to support the trial court's findings of fact that Defendant's harassment of Plaintiff inflicted substantial emotional distress. This argument too is unavailing.

Upon review of a trial court's findings of fact, "we are strictly limited to determining whether the . . . underlying findings of fact are supported by competent evidence . . . ." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted). Competent evidence, in the form of victim testimony and a detailed history of domestic violence, supports a court's finding that an act of domestic violence occurred. *Thomas v. Williams*, 242 N.C. App. 236, 773 S.E.2d 900 (2015). "Substantial emotional distress" is defined as "[s]ignificant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." N.C. Gen. Stat. § 14-277.3A(b)(4) (2018).

In *Thomas*, there was sufficient evidence that plaintiff suffered substantial emotional distress as a result of a voice mail defendant left plaintiff. *Thomas*, 242 N.C. App. at 244, 773 S.E.2d at 905. Plaintiff ended her relationship with defendant after only a few weeks, as she was afraid of defendant; defendant continued to contact plaintiff, despite her requests that he stop, which caused plaintiff to file a complaint and motion for DVPO. *Id.* at 237, 773 S.E.2d at 901-02. Defendant continued to contact plaintiff, and was arrested for stalking. Following his arrest, defendant called plaintiff and left her a voicemail wherein he stated, "you put me through hell. Now it's your turn." *Id.* at 238, 773 S.E.2d at 902. At the DVPO hearing, plaintiff testified that the voicemail caused her to experience distress and trouble sleeping, and caused her to have to leave her new job several times to deal with the defendant's actions. *Id.* This

Court concluded that plaintiff's testimony, combined with defendant's repeated unwelcome contact, was sufficient competent evidence that defendant caused plaintiff substantial emotional distress. *Id.* at 244, 773 S.E.2d at 905.

As in *Thomas*, there is sufficient competent evidence in this case that Plaintiff suffered substantial emotional distress as a result of Defendant's text messages. Like in *Thomas*, Plaintiff testified about her fear of Defendant, and that Defendant's text messages caused her anxiety and distress. Plaintiff testified that Defendant's text messages made her feel "worried about what's going to happen . . . . I mean he's repeatedly said he was going to kill me. He's kidnapped [the youngest child]. He's beaten [the oldest child]. I just -- I'm worried about my whole household whenever I get these. I don't know what's happening, if he's watching us, if he's trying to follow us. He's followed me in his truck before and tried to run me off the road. I just have to be concerned."

Plaintiff acknowledged that Defendant's texts, on their face, could appear "benign" if one did not know of Defendant's history of abuse against Plaintiff. However, Plaintiff testified that Defendant's texts make her feel "like [Defendant] is . . . after me or something bad is going to happen when I hear from him." She testified,

> I don't go anywhere without looking around, being aware of my surroundings, being aware of exits and entrances and how I'm going to get from one place to another. Where I live is not somewhere you can easily get to. I have large dogs, I have a security light, security system. I just put a lot of things in place to protect myself and the children.

She further explained that "the first place I moved had a garage and a fence so I could be totally surrounded."

Plaintiff received one of the six text messages from Defendant while she was out shopping for the children. She testified that, upon receiving the text, "I put everything down and ran to my car and I sent the messages to -- one to my uncle and I sent one to [my lawyer's] office and I sent one to my friend and then I got in my car and started driving until I had to pick [the oldest child] up." Plaintiff explained that, when she receives a communication from Defendant, it is her practice to forward it to "at least 2 people immediately in case something happens and so they can help me calm down. I go into a state of alarm, and usually do not feel at ease until I can get home and have the children there with me."

As in *Thomas*, where the defendant's repeated unwelcome contact, combined with the plaintiff's lifestyle alteration and her testimony that

she lived in fear of the defendant, was sufficient evidence to show that the plaintiff experienced substantial emotional distress, here, Plaintiff's testimony that Defendant's repeated contact caused her to feel terror, to change her housing arrangements, and to alter her daily routine is sufficient evidence of substantial emotional distress. *Thomas*, 242 N.C. App. at 244, 773 S.E.2d at 905. Defendant's argument is without merit.

E. Adequate Findings of Fact

[3] Defendant finally argues that the trial court's conclusion of law that Defendant committed acts of domestic violence was erroneous and not supported by adequate findings of fact. We disagree.

"[W]e are strictly limited to determining whether the . . . underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (quotation marks and citation omitted).

In support of its conclusion that Defendant committed acts of domestic violence against Plaintiff, the trial court found as follows:

> The Defendant has a history of domestic violence against the Plaintiff including threats to kill her and convictions for violating a Domestic Violence Order of Protection. On January 31, 2012 the Honorable David Leech ordered that Defendant shall have no written, verbal, telephonic, or electronic contact with Plaintiff. Despite Judge Leech's Order and against Plaintiff's wishes, Defendant sent Plaintiff six text messages between December 5, 2016 and July 25, 2017. Defendant's text messages have caused Plaintiff to fear for [her] safety. Plaintiff feels as if the Defendant is watching her and she has to constantly be aware of her surroundings.

Defendant argues that these findings do not support the trial court's conclusion that Defendant committed acts of domestic violence because it is analogous to the "vague finding of a general history of abuse" in *Kennedy* that was insufficient to support the conclusion of law that defendant committed an act of domestic violence. *Kennedy*, 221 N.C. App. at 223, 726 S.E.2d at 196.

In *Kennedy*, the trial court found, "after a long history of abuse plaintiff . . . remains afraid of the defendant who tries to intimidate her—surveillance on her house at late hours, making the plaintiff and her neighbors apprehensive." *Id.* at 220, 726 S.E.2d at 196 (brackets

omitted). However, this Court determined the specific dates and facts concerning the "long history of abuse" were unclear, but that it was "clear that defendant's recent act of hiring a PI service, and not the history of abuse, was the basis for the trial court's decision to enter the DVPO[.]" *Id.* at 223, 726 S.E.2d at 196 (quotation marks and brackets omitted). This Court thus concluded that "a vague finding of a general 'history of abuse' is not a finding of an 'act of domestic violence' as defined by N.C. Gen. Stat. § 50B-3(a)." *Id.*

Unlike in *Kennedy*, Plaintiff provided detailed evidence, as recited throughout this opinion, to support the court's findings that "Defendant has a history of domestic violence against the Plaintiff including threats to kill her and convictions for violating a DVPO" and that Defendant was to have no contact with Plaintiff or the children, per court order. Plaintiff provided the trial court with exact dates, court documents, therapist notes, and psychiatric recommendations regarding Defendant's abusive conduct.

Based on the copious, detailed evidence before it, the trial court made specific findings regarding Defendant's history of domestic violence against Plaintiff and Defendant's repeated harassment of Plaintiff in violation of a court order. The trial court's findings were supported by competent evidence, and the findings supported the conclusion of law that Defendant committed acts of domestic violence.

III. Conclusion

There was competent evidence to support the trial court's findings of fact that Defendant placed Plaintiff in fear of continued harassment that rose to such a level as to inflict substantial emotional distress. Moreover, the findings of fact support the ultimate conclusion of law that Defendant committed acts of domestic violence against Plaintiff. The trial court's Order is affirmed.

AFFIRMED.

Judges DILLON and INMAN concur.

CHERYL LLOYD HUMPHREY LAND INVESTMENT COMPANY, LLC, PLAINTIFF
v.
RESCO PRODUCTS, INC. AND PIEDMONT MINERALS COMPANY, INC., DEFENDANTS

No. COA19-76

Filed 16 July 2019

1. Torts, Other—interference with prospective economic advantage—Noerr-Pennington doctrine—applicability

A real estate company's claim for tortious interference with prospective economic advantage was not subject to the *Noerr-Pennington* doctrine—which provides immunity for certain petitioning activities undertaken by businesses, absent a bad faith motive to thwart competition—where the claim was not based on anti-competitive activities, since the parties were not competitors in the marketplace, and the complaint's allegations that defendants, owners of real property adjacent to a proposed development, made misrepresentations to a town planning board that induced a third party developer to back out of the deal, did not show that defendants were entitled to immunity as a matter of law.

2. Torts, Other—interference with prospective economic advantage—misrepresentations—ultrahazardous activity—actionability

A real estate company's claim that defendants—owners of property adjacent to a proposed development—tortiously interfered with prospective economic advantage by making misrepresentations to a town planning board (that caused a third party developer to back out of the deal) was not precluded even though the misrepresentations related to blasting, an activity that is deemed ultrahazardous under North Carolina law.

3. Torts, Other—interference with prospective economic advantage—contractual modifications—sufficiency of pleadings

A real estate company pleaded sufficient allegations to support a claim for tortious interference with prospective economic advantage against defendants, owners of property adjacent to a proposed development, based on allegedly intentional misrepresentations to a town planning board that induced a third party developer to back out of a deal, thereby harming plaintiff real estate company. Although the alleged interference caused the third party developer to modify an existing contract by terminating a second phase of the overall project rather than cancelling the entire agreement, the tort

applies equally to modifications of an existing contract and to prevention or termination of a contract.

Appeal by Plaintiff from order entered 1 October 2018 by Judge Michael J. O'Foghludha in Orange County Superior Court. Heard in the Court of Appeals 22 May 2019.

Manning Fulton & Skinner, P.A., by Charles L. Steel, IV, and J. Whitfield Gibson, for the Plaintiff-Appellant.

McGuireWoods LLP, by Abbey M. Krysak, for the Defendants-Appellees.

BROOK, Judge.

Plaintiff appeals the dismissal of its complaint by the trial court. Because the trial court dismissed Plaintiff's complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, our recitation of the facts is based on the allegations in Plaintiff's complaint.

I. Background

A. Factual Background

Plaintiff Cheryl Lloyd Humphrey Land Investment Company, LLC ("Plaintiff") is a limited liability company that owns real estate in Orange County, North Carolina. In the summer of 2013, Plaintiff entered negotiations with Braddock Park Homes, Inc. ("Braddock Park Homes") to sell Braddock Park Homes approximately 45 acres of real property located on Orange Grove and Enoe Mountain Road in Hillsborough, North Carolina. Braddock Park Homes planned to develop a 118 unit townhome subdivision similar in style to the existing Braddock Park townhome development located in Hillsborough. However, the proposed development could not be completed as planned unless the Town of Hillsborough ("the Town") agreed to annex the property and make certain zoning changes.

A series of meetings took place in the fall of 2013 in which the Town and its planning board considered whether to annex and re-zone the property as proposed. Defendants Resco Products, Inc. and Piedmont Minerals Company, Inc. ("Defendants"), owners of real property adjacent to the proposed development, participated in these meetings, opposing approval of the project by the Town. During the course of these proceedings, Defendants made various representations to the Town and

its planning board regarding the dangers posed by fly rock, air blasts, and ground vibrations resulting from their operations of a mine on land adjacent to the proposed townhome development and, specifically, blasting conducted at the mine. Despite Defendants' opposition to the project, however, the meetings before the Town and its planning board culminated in the Town approving Braddock Park Homes's request that the property be annexed by the Town, and making the required zoning changes.

After securing approval of the project from the Town, Plaintiff entered into a Purchase and Sale Agreement ("the Agreement") with Braddock Park Homes, the negotiation of which had been ongoing throughout the time of the proceedings before the Town and its planning board in fall of 2013 and early 2014. Defendants were aware of these negotiations.

The Agreement Plaintiff entered into with Braddock Park Homes contemplated two development phases. In Phase I, Braddock Park Homes agreed to purchase approximately 41 acres of real estate from Plaintiff for $85,000 per acre. In Phase II, Braddock Park Homes was granted a "free look" for a specified period of time to purchase an additional 5.5 acres, which was directly adjacent to land owned by Defendants, near the location of their mining operation. Under the Agreement, Braddock Park Homes enjoyed the right to terminate Phase II of the project. Although Phase I was consummated, Braddock Park Homes exercised its right to modify the Agreement on 9 October 2014, terminating Phase II. Braddock Park Homes cited the representations made by Defendants to the Town during the approval process as the reason for terminating Phase II.

B. Procedural History

On 27 October 2017, Plaintiff initiated this action. In its complaint, Plaintiff alleges a single cause of action for tortious interference with prospective economic advantage. Plaintiff's claim for tortious interference with prospective economic advantage is based on representations made by Defendants to the Town and its planning board during the approval process. Plaintiff asserts that these representations were in fact misrepresentations, and that these misrepresentations were made by Defendants maliciously, intentionally, and without justification, proximately resulting in the termination by Braddock Park Homes of Phase II of the Agreement, and injuring Plaintiff in an amount equal to the $85,000 per acre price of Phase I.

In lieu of an answer, Defendants filed a motion to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

The motion came on for hearing before the Honorable Michael J. O'Foghludha in Orange County Superior Court on 1 October 2018. The trial court granted Defendants' motion in an order entered the same day. Plaintiff entered timely notice of appeal on 29 October 2018.

II. Analysis

A. Standard of Review

A motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure "tests the legal sufficiency of the complaint by presenting the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some recognized legal theory." *Cage v. Colonial Bldg. Co., Inc.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994) (internal marks and citation omitted). A motion to dismiss for failure to state a claim upon which relief can be granted should not be granted unless it "appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970).

Our review of the decision by a trial court to grant a motion to dismiss under Rule 12(b)(6) is *de novo*. *Ventriglia v. Deese*, 194 N.C. App. 344, 347, 669 S.E.2d 817, 819–20 (2008). In determining whether "the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory[,] . . . [we] must construe the complaint liberally[.]" *Hinson v. City of Greensboro*, 232 N.C. App. 204, 208, 753 S.E.2d 822, 826 (2014) (internal marks and citation omitted). We will not affirm the dismissal of a complaint under Rule 12(b)(6) "unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Enoch v. Inman*, 164 N.C. App. 415, 417, 596 S.E.2d 361, 363 (2004) (internal marks and citation omitted).

B. The *Noerr-Pennington* Doctrine

[1] This appeal first presents the question of the applicability of the *Noerr-Pennington* doctrine. Defendants contend that the trial court did not err in concluding that Plaintiffs' complaint fails to state a claim upon which relief can be granted because the allegations in Plaintiffs' complaint are insufficient, as a matter of law, under the *Noerr-Pennington* doctrine. We disagree.

i. Introduction

We note at the outset that this case is not a dispute between competitors in the marketplace, nor does it arise in a context in which concerns about the consolidation of market power detrimentally impacting consumers animate a statutory or regulatory framework under which any claim at issue in this case arises. In the discussion that follows we summarize the origins of the *Noerr-Pennington* doctrine and its application in North Carolina. We go on to hold that the *Noerr-Pennington* doctrine does not apply to this case. Accordingly, we reject the argument that the complaint fails to state a claim upon which relief can be granted under the *Noerr-Pennington* doctrine.

ii. The Origins of the *Noerr-Pennington* Doctrine

The *Noerr-Pennington* doctrine originates from the U.S. Supreme Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed.2d 464 (1961) ("*Noerr*"), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed.2d 626 (1965) ("*Pennington*"), which are together its namesake. In *Noerr*, the Supreme Court held that the First Amendment protects businesses when they engage in certain petitioning activities, such as initiating litigation, providing them with immunity from antitrust liability when their conduct is aimed at influencing governmental action and their petitioning activity otherwise potentially violates §§ 1 and 2 of the Sherman Act, which proscribe conspiracies to restrain trade and attempts to impose monopolies, respectively. *See* 365 U.S. at 135-37, 81 S. Ct. at 528-29. *Pennington* then reiterated the core teaching of *Noerr*: that immunity from antitrust liability under the First Amendment exists for "concerted effort[s] to influence public officials regardless of intent or purpose." 381 U.S. at 670, 85 S. Ct. at 1593.

However, the Supreme Court in *Noerr* recognized an exception to this immunity where the conduct at issue is a "mere sham," such as where an anti-competitive publicity campaign, while "ostensibly directed toward influencing governmental action, is . . . actually nothing more than an attempt to interfere directly with the business relationships of a competitor[.]" 365 U.S. at 144, 81 S. Ct. at 533. For example, for the "sham" exception to the doctrine to apply to a lawsuit it "must be objectively baseless and must conceal an attempt to interfere directly with the business relationships of a competitor"; that is, "the plaintiff must have brought baseless claims in an attempt to thwart competition (i.e., in bad faith)." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*,

572 U.S. 545, 556, 134 S. Ct. 1749, 1757, 188 L. Ed.2d 816 (2014) (internal marks and citation omitted).

iii. The Application of the *Noerr-Pennington* Doctrine in North Carolina

This Court has addressed the applicability of the *Noerr-Pennington* doctrine three times previously. The first was *Reichhold Chemicals, Inc. v. Goel*, 146 N.C. App. 137, 555 S.E.2d 281 (2001). *Reichhold Chemicals* involved the departure of an expert in the field of moisture cured polyurethane adhesives from the employ of the plaintiff, a business competing in the adhesives space, and the subsequent engagement of this expert, the defendant, by a direct competitor of the plaintiff in the adhesives business, who was not a party to the appeal to this Court. *Id.* at 142-43, 555 S.E.2d at 284-85.

We observed in *Reichhold Chemicals* that the Supreme Court's decision in *Noerr* was based "on the First Amendment right to petition and . . . federal antitrust law." *Id.* at 148, 555 S.E.2d at 288. Rejecting the plaintiff's challenge to the sufficiency of the pleading of the defendant's counterclaims based on the *Noerr-Pennington* doctrine, we reasoned that the defendant's counterclaims did not interfere with the plaintiff's First Amendment rights to seek redress from the government for the harms it allegedly suffered as a result of its competitor's conduct. *Id.* The defendant, therefore, was not required to supplement the pleadings in his counterclaim by including allegations that, if proven, would establish that the sham exception under the *Noerr-Pennington* doctrine applied. *See id.* We instead concluded that the *Noerr-Pennington* doctrine itself did not apply, refusing to accept the argument that the failure to plead through the exception to *Noerr-Pennington* immunity was fatal to the defendant's counter-complaint. *See id.* (observing that "even if plaintiff's suit against [its competitor] was objectively reasonable, plaintiff could still be liable for tortious interference" to the defendant).

We addressed the *Noerr-Pennington* doctrine for a second time in *Good Hope Hosp., Inc. v. NC Dep't of Health and Hum. Sevs.*, 174 N.C. App. 266, 620 S.E.2d 873 (2005). *Good Hope Hosp.* involved a Certificate of Need ("CON") issued by the North Carolina Department of Health and Human Services ("the Department") to one of the plaintiffs, a hospital, to build a replacement facility roughly three miles from its existing facility. *Id.* at 268, 620 S.E.2d at 876-77. After the CON was issued by the Department, the plaintiff entered a joint venture with a hospital group, and through this joint venture applied for a second CON, this time for a larger facility, in a different location than the replacement facility that

had initially been approved. *Id.* at 268, 620 S.E.2d at 877. The application for this second CON was not approved, and the plaintiff-hospital and plaintiff-hospital group, along with the municipality where the second, larger proposed facility was to be located, sought a declaratory judgment that the proposed, larger facility was not subject to the CON approval requirements under the Department's purview. *Id.* at 269, 620 S.E.2d at 877. They also filed various claims against the Department and another hospital that had opposed approval of the second facility, including claims for tortious interference with contract, tortious interference with prospective economic advantage, a conspiracy in restraint of trade under N.C. Gen. Stat. § 75–1, unfair and deceptive trade practices under N.C. Gen. Stat. § 75–1.1, and common law unfair competition. *Id.*

In *Good Hope Hosp.*, we held that the *Noerr-Pennington* doctrine applied. *Id.* at 275, 620 S.E.2d at 881. Observing that numerous federal courts, including the Fourth Circuit, had applied the *Noerr-Pennington* doctrine, we noted in particular that *Noerr-Pennington* immunity had been recognized by the federal courts to be applicable "in the context of certificate of need cases." *Id.* at 276, 620 S.E.2d at 881. In holding the doctrine applicable, we affirmed the trial court's dismissal of the plaintiffs' claims on the basis of the *Noerr-Pennington* doctrine because the plaintiffs' complaint did not contain allegations that, if proven, would establish that their lawsuit was not a "mere sham," thus falling within the exception to *Noerr-Pennington* immunity. *Id.* at 276-78, 620 S.E.2d at 881-82. We went on to explain that in CON cases implicating *Noerr-Pennington* immunity, the allegations in the plaintiff's complaint must "show one of three things":

> (1) defendant's advocacy before the Department was objectively baseless and merely an attempt to stifle competition; (2) defendant engaged in a pattern of petitions before the Department without regard to the merit of the petitions; or (3) defendant's misrepresentations before the Department deprived the entire CON proceeding of its legitimacy.

Id. at 276, 620 S.E.2d at 882 (internal marks omitted). Because a review of the complaint revealed no allegations that, if proven, would establish that the sham exception applied, we affirmed the trial court's dismissal of the complaint on the basis of *Noerr-Pennington* immunity. *Id.* at 277-78, 620 S.E.2d at 882.

Good Hope Hosp. was not this Court's last word on the applicability of the *Noerr-Pennington* doctrine in North Carolina state courts.

See North Carolina Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 220 N.C. App. 212, 725 S.E.2d 638 (2012), *rev'd in part on other grounds*, 366 N.C. 505, 742 S.E.2d 781 (2013). *Cully's Motorcross* involved the denial of an insurance claim on a policy covering a historic building that burned under circumstances considered suspicious by the plaintiff, the defendants' insurance company. *Id.* at 214-15, 725 S.E.2d at 640-41. Based on the circumstances surrounding the purchase of the building and the fire that destroyed it, the insurance company made a report to law enforcement, and one of the defendants was arrested and charged with obtaining property by false pretenses on the basis of this report. *Id.* at 215, 725 S.E.2d at 641. Thereafter, the insured who was arrested and charged criminally, one of the defendants, asserted a counterclaim against the insurance company, for malicious prosecution. *Id.* at 215, 725 S.E.2d at 641. The criminal charge against this defendant was later dismissed. *Id.*

After a bench trial but before the court entered a judgment, the plaintiff moved for a new trial or, in the alternative, a judgment that it enjoyed *Noerr-Pennington* immunity as a defense to the malicious prosecution claim. *Id.* at 215-16, 725 S.E.2d at 641. The trial court denied the motion, finding the plaintiff liable for malicious prosecution, and awarding the defendants damages and costs, including treble damages and attorney's fees. *Id.* at 215-16, 725 S.E.2d at 641.

We rejected the plaintiff's argument on appeal that the trial court erred in denying the motion for new trial or for judgment as a matter of law on the issue of *Noerr-Pennington* immunity. *Id.* at 232, 725 S.E.2d at 650. We clarified that our decision in *Reichhold Chemicals* was based on the objective reasonableness of the defendant's counterclaims, which did not need to be pleaded through the sham exception to *Noerr-Pennington* immunity where the doctrine did not apply. *Id.* at 231-32, 725 S.E.2d at 650. We reasoned that the trial court's ruling on the motion for a new trial or for judgment as a matter of law based on the *Noerr-Pennington* doctrine was not error because the trial court's basis for concluding that the doctrine did not apply – that the claim for malicious prosecution was asserted without probable cause – was sound. *Id.* at 232, 725 S.E.2d at 650. We therefore affirmed the trial court's conclusion that the doctrine did not apply to the facts before us, despite our holding in *Good Hope Hosp.*, that the doctrine is applicable in North Carolina state courts. *See id.*

iv. Applicability of the *Noerr-Pennington* Doctrine to the Present Case

As noted previously, the present case is not a dispute between competitors in the marketplace, nor does it arise in the CON context, where concerns about the consolidation of market power detrimentally impacting consumers inform decisions by the Department to approve or deny a CON. There is no cause of action pleaded by Plaintiff or Defendants for a conspiracy in restraint of trade under N.C. Gen. Stat. § 75–1, unfair and deceptive practices under N.C. Gen. Stat. § 75–1.1, common law unfair competition, or any other anti-competitive-related harm proscribed by law. Instead, Plaintiff's sole cause of action involves various alleged misrepresentations made by Defendants to the Town about the dangers posed by fly rock, air blasts, and ground vibrations created by the mining operation conducted by Defendants on the property adjacent to the proposed townhome development, including both the approximately 41 acres in Phase I, the sale of which was consummated, and the 5.5 acres in Phase II, which Plaintiff alleges Defendants' "malicious[], intentional[], and [] [un]justifi[ed] misrepresent[ations]" rendered significantly less valuable that it would have been, were it not for these alleged misrepresentations.

We hold that the *Noerr-Pennington* doctrine does not apply to the facts as alleged in Plaintiff's complaint, which we consider true on review of a trial court's decision to grant a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *See, e.g.*, *Hinson*, 232 N.C. App. at 208, 753 S.E.2d at 826 ("We consider whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.") (internal marks and citation omitted). The absence of allegations in Plaintiff's complaint pleading the cause of action for tortious interference with prospective economic advantage into the "sham" exception to the *Noerr-Pennington* doctrine is not a defect of the complaint, much less one warranting dismissal of the complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6). This is the case because the allegations in the complaint do not show that Defendants, as a matter of law, enjoy *Noerr-Pennington* immunity from Plaintiff's claim for tortious interference with prospective economic advantage. To be sure, the question would be closer if there were an allegation that actionable anti-competitive-related harms resulted from petitioning activity protected by the First Amendment. However, no such allegation has been made in this case, and there does not appear to be support for such an allegation in the record before us. Accordingly, we conclude that, on the facts of the complaint, the *Noerr-Pennington* doctrine does not apply.

C. The Alleged Misrepresentations

[2] The alleged misrepresentations at issue present a question of first impression under North Carolina law; namely, whether misrepresentations about the dangers of an activity North Carolina law regards as ultrahazardous—indeed, the only activity regarded by North Carolina law as ultrahazardous—can be overstated and, in their overstatement, become actionable misrepresentations upon which a cause of action for tortious interference with prospective economic advantage can be predicated. We hold that they can.

North Carolina law has recognized blasting activities as ultrahazardous since the Supreme Court's decision in *Guilford Realty & Ins. Co. v. Blythe Bros. Co.*, 260 N.C. 69, 131 S.E.2d 900 (1963). The Supreme Court in *Blythe* identified blasting as "intrinsically dangerous," reasoning that the impossibility of "predict[ing] with certainty the extent or severity of [resulting] consequences" rendered blasting ultrahazardous. *Id.* at 74, 131 S.E.2d at 904. The Supreme Court held that a rule of strict liability applies to actionable harms resulting from blasting. *Id.* Numerous subsequent decisions by the Supreme Court have reiterated the holding of *Blythe*. *See, e.g.*, *Trull v. Carolina-Virginia Well Co.*, 264 N.C. 687, 691, 142 S.E.2d 622, 624 (1965) ("[O]ne who is lawfully engaged in blasting operations is liable without regard to whether he has been negligent, if by reason of the blasting he causes direct injury to neighboring property or premises"); *Falls Sales Co. v. Bd. of Transp.*, 292 N.C. 437, 442, 233 S.E.2d 569, 572 (1977) ("We have held that blasting is an . . . [ultrahazardous] activity and that persons using explosives are strictly liable for damages proximately caused by an explosion"); *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991) ("Parties whose blasting proximately causes injury are held strictly liable for damages . . . largely because reasonable care cannot eliminate the risk of serious harm."). Blasting is the only ultrahazardous activity under North Carolina law. *See Jones v. Willamette Indus.*, 120 N.C. App. 591, 596, 463 S.E.2d 294, 298 (1995); *O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 311 n. 2, 511 S.E.2d 313, 317 n. 2 (1999); *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000); *Harris v. Tri-Arc Food Sys.*, 165 N.C. App. 495, 499, 598 S.E.2d 644, 647 (2004); *Vecellio & Grogan, Inc. v. Piedmont Drilling & Blasting, Inc.*, 183 N.C. App. 66, 69, 644 S.E.2d 16, 19 (2007).

The alleged misrepresentations in this case involve the very dangers North Carolina law guards against in its recognition of blasting as ultrahazardous. However, Defendants, the parties engaged in the blasting activities at issue, cite the ultrahazardous nature of their activities as the

reason Plaintiff's claim cannot succeed, unlike in the more typical case, where the plaintiff will be relieved of proving an element of his or her case – breach of a duty of reasonable care – against a defendant engaged in blasting activities. Citing the numerous decisions by the Supreme Court reiterating the principle that no amount of reasonable care can "eliminate the risk of serious harm" accompanying an ultrahazardous activity such as blasting, *see Woodson*, 329 N.C. at 350, 407 S.E.2d at 234, Defendants contend that these risks simply cannot be overstated to an extent that they constitute actionable misrepresentations upon which a claim for tortious interference with prospective economic advantage can be based. We disagree.[1]

It does not follow that simply because no amount of reasonable care eliminates the risk of serious harm from blasting it is impossible, as a matter of law, to overstate the risks of harm from blasting. The former principle is a proposition stating the rationale for imposing strict liability for injuries resulting from blasting; it does not mean that the dangers inherent in the activity cannot be described – or mis-described. And it does not mean that an injury resulting from such mis-description, as is alleged in this case, is not actionable. Similarly, the principle that no amount of reasonable care eliminates the risk of serious harm from blasting does not imply that detrimental reliance on a misrepresentation of the risk of this ultrahazardous activity could not be the basis for recovery on a fraud claim, or for challenging the validity of a contract, a party's consent to which was procured by fraud. We hold that a claim that has as an element the truthfulness of a representation about an activity North Carolina law regards as ultrahazardous can survive a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure even though the content of the representation relates to an activity regarded by the law as ultrahazardous. Success on Plaintiff's claim for tortious interference with prospective economic advantage thus is not precluded by the content of Defendants' representations to the Town, notwithstanding the rule of strict liability applicable to cases in which injury is alleged to result from an ultrahazardous activity.

D. Tortious Interference with Prospective Economic Advantage

[3] A number of arguments raised by the parties relate to whether the cause of action for tortious interference with prospective economic advantage was properly pleaded by Plaintiff. In a related vein,

1. We also note that the Town apparently did not credit Defendants' alleged misrepresentations, approving the Braddock Park Homes development project despite their vocal opposition to approval of the project.

Defendants argue that facts alleged in the complaint, if established, foreclose the possibility of Plaintiff's success at trial. We disagree, and hold that the claim for tortious interference with prospective economic advantage was properly pleaded, and that the facts alleged in Plaintiff's complaint do not foreclose the possibility of Plaintiff's success at trial.

Generally speaking, "[a]n action for tortious interference with prospective economic advantage is based on conduct by the defendants which prevents the plaintiff[] from entering into a contract with a third party." *Walker v. Sloan*, 137 N.C. App. 387, 392-93, 529 S.E.2d 236, 241 (2000). Tortious interference with prospective economic advantage

> arises when a party interferes with a business relationship by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference if damage proximately ensues, when this interference is done not in the legitimate exercise of the interfering person's rights.

Beverage Sys. of the Carolinas v. Assoc. Beverage Repair et al., 368 N.C. 693, 701, 784 S.E.2d 457, 463 (2016) (internal marks and citation omitted). Stating a claim for tortious interference with prospective economic advantage requires that the plaintiff "allege facts [] show[ing] that the defendants acted without justification in inducing a third party to refrain from entering into a contract with them[,] which contract would have ensued but for the interference." *Walker*, 137 N.C. App. at 393, 529 S.E.2d at 242.

In its complaint, Plaintiff alleges as follows:

> 17. In the summer of 2013, the Plaintiff began negotiations with Braddock Park Homes, Inc., to sell that entity approximately 45 acres of real property located on Orange Grove and Enoe Mountain Road, Hillsborough, North Carolina.
>
> . . .
>
> 29. At the time Defendants made [certain] malicious misrepresentations to the Town of Hillsborough, it was aware that the Plaintiff was negotiating with Braddock Park Homes for the townhome development project.
>
> 30. On February 28, 2014, the Plaintiff entered into a Purchase and Sale Agreement with Braddock Park Homes, Inc., whereby the Plaintiff agreed to sell Braddock Park Homes, Inc. approximately 41 acres of real property

located in Orange Groves and Enoe Mountain Road, Hillsborough, North Carolina at $85,000 per acre.

31. The February 28, 2014 Purchase and Sale Agreement contained a provision that gave Braddock Home a specified period of time for a "free look" at Phase II (Section B) of the project, which was the 5.5 acres located adjacent to Defendants' Hillsborough Mine, due to the request of the Defendants to deny the approval of that Phase of the project due to the potential threat of damage to health, safety and welfare of future residents of Enoe Mountain Village due to fly rock, nitrogen and structural damage from the operations of the Defendant's Hillsborough Mine.

32. The February 29, 2014 [*sic*] Purchase and Sale Agreement further gave Braddock Park Homes, Inc. the right, subject to Plaintiff's acceptance, to terminate Phase II of the Town Home Project from the contract if this threat of liability was not removed to its satisfaction.

33. On October 9, 2014, Braddock Park Homes, Inc. exercised its right to modify the Purchase and Sale Agreement and terminate Phase II (Parcel B-3) from the Agreement, citing dangers of foundation damage to homes, fly rock from blasting and nitrogen dangers to future inhabitants based on the Defendants misrepresentation to the Town of Hillsborough.

34. The Defendants' malicious misrepresentations to the Town of Hillsborough were without justification in that at the time they were made, the Defendants were required by their September 11, 2013 Permit to take measures to prevent physical hazard to any neighboring dwelling house if their mining excavation came within 300 feet thereof, regardless of the cost of doing so.

35. The Defendants intentionally induced Braddock Park, Inc. not to enter into a contract for the purchase of Phase II of the Town Home Project by making these intentional misrepresentations to the Town of Hillsborough.

36. The Defendants' malicious misrepresentations to the Town of Hillsborough were without justification in that at the time they were made the Defendants had no evidence that the blasting operations from their Hillsborough Mine

had endangered persons or neighboring property from fly rock or excessive air blasts or ground violations.

37. The Defendants' interference with the Plaintiff's pending contract with Braddock Park Homes, Inc. was without justification in that the Defendants' motives were not reasonably related to the protection of the legitimate business interest of the Defendants.

38. In making these intentional misrepresentations, the Defendants acted without justification, not in the legitimate exercise of Defendants' own rights, but with design to injure Plaintiff or obtain some advantage at their expense.

39. By virtue of their malicious misrepresentations made to the Town of Hillsborough, the Defendants induced Braddock Park Homes, Inc. not to perform Phase II of the Purchase and Sale Agreement so that the Defendants could purchase the 5.5 acre tract adjacent to their property at a substantially discounted price.

40. Subsequent to the town's approval of the Town Home Project, the Defendant did in fact offer to purchase the 5.5 acre tract located adjacent to its Hillsborough Mine far below the fair market value for the Property.

41. By virtue of their intentional and malicious misrepresentations made to the Town of Hillsborough, the Defendants tortuously interfered with the Plaintiff's economic advantage by inducing Braddock Park Homes, Inc. not to perform Phase 2 of the Town Home Project.

42. But for the intentional misrepresentations of the Defendants, Braddock Park Homes, Inc. would not have modified the February 29, 2014 Purchase and Sale Agreement to eliminate Phase II of the Town Home Project.

43. By virtue of the Defendants' tortious interference with the Plaintiff's prospective economic advantage, the Plaintiff has suffered damages in the amount of $467,755.

Our review of the allegations in Plaintiff's complaint confirms that Plaintiff has alleged (1) the existence of a valid business relationship; (2) interference with that business relationship by an outsider; (3) the absence of a legitimate justification for the alleged interference by the outsider; (4) malice by the outsider in engaging in the alleged

interference; (5) causation from the alleged interference resulting in damages to Plaintiff; and (6) damages suffered by Plaintiff to a sum certain, $467,755. These allegations are adequate to make out a cause of action for tortious interference with prospective economic advantage.

Defendants argue that Plaintiff has not adequately pleaded a claim for tortious interference with prospective economic advantage because the alleged interference did not induce Braddock Park Homes to refrain from entering into a new contract with Plaintiff but instead only induced Braddock Park Homes to exercise its modification rights to back out of Phase II of its multi-phase development deal with Plaintiff. Defendants suggest that it would be an expansion of the tort of tortious interference with prospective economic advantage under North Carolina law "to include . . . modifications in addition to prevented contracts and contract breaches." We disagree.

The tort of tortious interference with prospective economic advantage under North Carolina law not only embraces instances in which "the defendant . . . induce[s] a third party to refrain from entering into a contract with the plaintiff," *see MCL Automotive v. Town of Southern Pines*, 207 N.C. App. 555, 571, 702 S.E.2d 68, 79 (2010), it also extends to inducement by a third party, the outsider, of a party to a contract "to terminate or fail to renew [that] contract," *see Robinson, Bradshaw & Hinson v. Smith*, 129 N.C. App. 305, 317, 498 S.E.2d 841, 850 (1998). The reason the difference between the interference preventing a new contract from being made, resulting in the cancellation or termination of an existing agreement, or prompting a party to an existing agreement to allow the agreement to expire rather than renew it for an additional term, is not a meaningful one as this element relates to a party's liability, is that in all three variations, the requirement is met that the prospective economic advantage with which the outsider interferes is substantial enough to permit recovery, and not a "mere expectancy," which has been held to be insufficient. *See Beverage Sys. of the Carolinas*, 368 N.C. at 701, 784 S.E.2d at 463.

Similarly, the difference between a party to an agreement exercising modification rights in a multi-phase development deal to terminate one part of a multi-part agreement, as is alleged to have occurred in this case, and the party canceling the entire agreement, is not relevant to whether the third party whose interference resulted in the choice to terminate the contract is liable for tortious interference with the prospective economic advantage derived from one or all phases of the multi-part agreement. As we observed in *Reichhold Chemicals*, "[i]nducing a person not to enter into a contract is as much a tort as interference with an

established contract." 146 N.C. App. at 151, 555 S.E.2d at 290. So too is inducing a person or entity to terminate a contract, *see Smith*, 129 N.C. App. at 317, 498 S.E.2d at 850, such as in this case, by allegedly inducing a third party not to consummate a later phase of a multi-phase development deal, regardless of whether the contractual vehicle defeating the prospective economic advantage is denominated a termination, cancellation, prevention, rescission, or other language of similar import and effect. Accordingly, we hold that the tort of tortious interference with prospective economic advantage under North Carolina law includes contractual modifications equivalent in effect to terminations of parts of multi-part agreements.

III. Conclusion

We reverse and remand the trial court's dismissal of Plaintiff's complaint for failure to state a claim upon which relief can be granted for three reasons. First, the allegations in the complaint do not establish the *Noerr-Pennington* doctrine applies to this case to bar Plaintiff's claims. Second, the alleged misrepresentations are actionable under North Carolina law even though their content relates to activity regarded by the law as ultrahazardous. Third, the cause of action for tortious interference with prospective economic advantage alleged in Plaintiff's complaint is properly pleaded, and this tort includes terminations of parts of multi-part agreements.

REVERSED AND REMANDED.

Judges STROUD and HAMPSON concur.

COATES v. DURHAM CTY.

[266 N.C. App. 271 (2019)]

RHONDA COATES, TIMOTHY ELLIS, PATRICK AND MARIE MAHONEY, KENNETH PRICE, BRYAN AND ANGELA SARVIS, JAMES VENTRILLA, AND JAMES WOLAK, PETITIONERS

v.

DURHAM COUNTY, A NORTH CAROLINA COUNTY, AND HUBRICH CONTRACTING, INC., A NORTH CAROLINA CORPORATION, RESPONDENTS

No. COA18-1298

Filed 16 July 2019

Appeal and Error—interlocutory appeal—reversal of special-use permit—remand for rehearing—substantial right

The trial court's order—which reversed the decision of a city-county Board of Adjustment allowing a special-use permit for a middle school and instructed the Board to reopen the public hearing on the matter—was interlocutory because it remanded the case to a municipal body for further proceedings. The appeal was dismissed where the building contractor failed to show a substantial right would be lost absent appellate review.

Appeal by Respondent Hubrich Contracting, Inc. from Order entered 28 August 2018 by Judge G. Bryan Collins in Durham County Superior Court. Heard in the Court of Appeals 8 May 2019.

Brown & Bunch, PLLC, by LeAnn Nease Brown, for petitioners-appellees.

Morningstar Law Group, by Jeffrey L. Roether and Patrick L. Byker, for respondent-appellant Hubrich Contracting, Inc.

HAMPSON, Judge.

Hubrich Contracting, Inc. (Respondent) appeals from an Order reversing the decision of the Durham City-County Board of Adjustment (BOA) to grant a Minor Special-Use Permit (Permit) to Respondent. We, however, determine the Order that Respondent appeals from is an interlocutory order that does not affect a substantial right of Respondent. Therefore, we dismiss this appeal.

Factual and Procedural Background

On 7 November 2016, Respondent commenced this proceeding by filing an application for the Permit with the Durham City-County

Planning Department, which Permit would allow Respondent to construct a middle school on certain property in Durham County. Following a hearing before the BOA on 28 February 2017, the BOA issued an order granting the Permit on 28 March 2017. On 25 April 2017, Rhonda Coates, Timothy Ellis, Patrick and Marie Mahoney, Kenneth Price, Bryan and Angela Sarvis, James Ventrilla, and James Wolak (Petitioners) petitioned the Durham County Superior Court for review by way of a writ of *certiorari*. The Durham County Superior Court granted Petitioners' petition on 25 April 2017 and ordered a hearing.

The hearing occurred on 11 September 2017, and after the hearing concluded, the presiding judge took the matter under advisement. On 28 August 2018, the trial court entered its Final Order and Judgment (Order). In its Order, the trial court reversed the BOA's decision to grant the Permit to Respondent and remanded the matter to the BOA with instructions to, *inter alia*, reopen the public hearing on Respondent's application for the Permit. Respondent appeals from this Order.

Jurisdiction

Although neither party raises this issue, we must address whether this appeal is properly before this Court. *See Akers v. City of Mount Airy*, 175 N.C. App. 777, 778, 625 S.E.2d 145, 146 (2006) ("[When faced with] a jurisdictional issue, this Court has an obligation to address the issue *sua sponte* regardless [of] whether it is raised by the parties." (citation omitted)). Indeed, Respondent contends as grounds for appellate review that the Order "is a final judgment . . . and therefore is appealable to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b)." We disagree.

"An interlocutory order . . . is one made during the pendency of an action which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993) (citation omitted).

> [T]his Court has consistently held that an order by a superior court, sitting in an appellate capacity, that remands to a municipal body for additional proceedings is not immediately appealable. *See, e.g., Heritage Pointe Builders [v. N.C. Licensing Bd. of General Contractors]*, 120 N.C. App. [502,] 504, 462 S.E.2d [696,] 698 (1995) (appeal of superior court's remand to a licensing board for rehearing dismissed as interlocutory); *Jennewein v. City Council of the City of Wilmington*, 46 N.C. App. 324, 326, 264 S.E.2d

802, 803 (1980) (appeal of superior court's remand to a city council for a *de novo* hearing dismissed as interlocutory).

Akers, 175 N.C. App. at 779-80, 625 S.E.2d at 146-47 (appeal of superior court's remand to a board of commissioners for further proceedings dismissed as interlocutory).

Here, Respondent appeals from an Order reversing the BOA's decision to grant Respondent the Permit. In its Order, the trial court instructs the BOA to reopen the public hearing on Respondent's application for the Permit after following certain notice procedures and orders the BOA to conduct a new hearing on Respondent's application. Because this Order "remands to a municipal body for additional proceedings[,]" this appeal is interlocutory. *See id.* (citations omitted).

A party may appeal an interlocutory order if either: (1) the trial court certifies there is no just reason to delay appeal under N.C. Gen. Stat. § 1A-1, Rule 54(b) or (2) if delaying the appeal would affect a substantial right. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citations omitted). Here, the trial court's Order does not contain a Rule 54(b) certification; therefore, we consider whether the Order affects a substantial right of Respondent.

A substantial right has consistently been defined as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right." *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (citation, quotation marks, and brackets omitted). The burden is on the appellant to establish that "the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253 (citation and quotation marks omitted). Further, "[i]t is not the duty of this Court to construct arguments for or find support for [the] appellant's right to appeal from an interlocutory order[.]" *Id.* at 380, 444 S.E.2d at 254 (citations omitted).

As discussed *supra*, Respondent's appeal is interlocutory, and in its brief, Respondent offers no substantial right that would be affected absent a review prior to a final determination on the merits. However, Rule 28(b)(4) of our Rules of Appellate Procedure requires that "[w]hen an appeal is interlocutory, the statement [of the grounds for appellate review in the appellant's brief] must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4). Our Court has noted

that in the context of interlocutory appeals, a violation of Rule 28(b)(4) is jurisdictional and requires dismissal. *See Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77-78, 772 S.E.2d 93, 96 (2015) ("[W]hen an appeal is interlocutory, Rule 28(b)(4) is not a 'nonjurisdictional' rule. Rather, the *only way* an appellant may establish appellate jurisdiction in an interlocutory case (absent rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right.").

At oral argument, when confronted with the possibility that this Order was interlocutory, Respondent offered two arguments in support of finding a substantial right. Respondent first contended that "it [was] simply a matter of time" that would be lost if its appeal was dismissed. However, our Court has recognized that "avoidance of a rehearing or trial is not a 'substantial right' entitling a party to an immediate appeal." *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983) (citation omitted).

Respondent next asserted that *PHG Asheville, LLC v. City of Asheville*, ___ N.C. App. ___, 822 S.E.2d 79 (2018), requires us to address the merits of this appeal because, according to Respondent, that case involved an appeal from a superior court order reversing a city council's decision to deny the petitioner's application for a conditional-use permit and our Court reached the merits of the appeal. However, Respondent overlooks a crucial distinction between *PHG Asheville, LLC* and the case *sub judice*. In *PHG Asheville, LLC*, the City of Asheville appealed the superior court's order "conclud[ing] the [c]ity's decision to deny [p]etitioner a [conditional-use permit] was arbitrary and capricious, and [the superior court] reversed and remanded the matter with *an order to the [c]ity [c]ouncil to grant [p]etitioner's requested [conditional-use permit.]*" *Id.* at ___, 822 S.E.2d at 83 (emphasis added). Therefore, the superior court's order in *PHG Asheville, LLC* was a final order because it directed the city council to grant the conditional-use permit, which "[left] nothing to be judicially determined between [the parties] in the [quasi-judicial proceeding]." *See Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted). Here, the trial court's Order did not direct the BOA to either grant or deny Petitioner's application for the Permit; therefore, *PHG Asheville, LLC* is inapplicable.

Consequently, because the trial court's Order reversed the BOA's grant of the Permit and remanded the case to the BOA for further proceedings, this appeal is interlocutory. Further, Respondent has failed to show that a substantial right would be lost absent appeal. Therefore, we

must dismiss this appeal. *See Akers*, 175 N.C. App. at 779-80, 625 S.E.2d at 146-47 (citations omitted).

Conclusion

Accordingly, for the foregoing reasons, we dismiss the appeal for lack of appellate jurisdiction.

APPEAL DISMISSED.

Judges STROUD and YOUNG concur.

GARY DELLINGER, VIRGINIA DELLINGER AND TIMOTHY S. DELLINGER, PETITIONERS
v.
LINCOLN COUNTY, LINCOLN COUNTY BOARD OF COMMISSIONERS AND STRATA SOLAR, LLC, RESPONDENTS, AND MARK MORGAN, BRIDGETTE MORGAN, TIMOTHY MOONEY, NADINE MOONEY, ANDREW SCHOTT, WENDY SCHOTT, ROBERT BONNER, MICHELLE BONNER, JEFFREY DELUCA, LISA DELUCA, MARTHA MCLEAN, CHARLEEN MONTGOMERY, ROBERT MONTGOMERY, DAVID WARD, INTERVENOR RESPONDENTS

No. COA18-1080

Filed 16 July 2019

1. Zoning—standing—mootness—denial of conditional use permit—withdrawal of permit application

An appeal of a county board of commissioners' denial of a conditional use permit was not moot even though the company that had applied for the permit withdrew its application. Because the owners of the property continued to seek appellate review and issuance of a conditional use permit for their property, the Court of Appeals retained subject matter jurisdiction.

2. Zoning—conditional use permit—due process—right to impartial hearing—bias of commissioner

Petitioner property owners' due process rights to an impartial hearing were violated where one of the county commissioners who voted on their conditional use permit had opposed the proposed solar farm before serving as a county commissioner (including contributing money to efforts against the solar farm) and demonstrated his bias during the hearing by actively opposing the permit before the board.

3. Zoning—conditional use permit—prima facie showing—rebuttal

Intervenors who opposed a conditional use permit for a solar farm on petitioner property owners' land failed to present sufficient evidence to rebut petitioners' prima facie showing of entitlement to issuance of the permit. Even though the intervenors presented the testimony of a certified real estate appraiser regarding injury to the value of nearby property, petitioners' evidence challenged and contradicted that evidence.

Judge BERGER concurring in separate opinion.

Appeal by petitioners from order entered 21 May 2018 by Judge Karen Eady-Williams in Lincoln County Superior Court. Heard in the Court of Appeals 23 April 2019.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Jason White, for petitioner-appellants.

The Deaton Law Firm, PLLC, by Wesley L. Deaton, Megan H. Gilbert and Jacob R. Glass, for respondent-appellee Lincoln County and Lincoln County Board of Commissioners.

Scarbrough & Scarbrough, PLLC, by James E. Scarbrough and Sean A. McLeod, for intervenor respondent-appellees.

TYSON, Judge.

Gary Dellinger, Virginia Dellinger, and Timothy S. Dellinger ("Petitioners") appeal from an order affirming the quasi-judicial decision of the Lincoln County Board of Commissioners ("the Board") to deny the issuance of a conditional use permit. We reverse and remand.

I. Background

This case returns to this Court a second time. *Dellinger v. Lincoln Cty.*, 248 N.C. App. 317, 789 S.E.2d 21, *disc. review denied*, 369 N.C. 190, 794 S.E.2d 324 (2016). A more detailed recitation of the facts of this matter can be found in this Court's opinion from the first appeal. *Id.* at 318-21, 789 S.E.2d at 24-25.

Petitioners own approximately fifty-four acres of real property located in Lincoln County, North Carolina. In 2013, Petitioners

contracted with Strata Solar, LLC ("Strata") to lease a portion of the property for the installation of a solar farm. Strata applied for a conditional use permit, which the Board denied. On appeal, the superior court concluded the Board did not make sufficient findings of fact concerning the impact of the proposed solar farm on surrounding property values, and remanded the matter to the Board to make additional findings. After remand, the superior court affirmed the Board's decision, which had concluded Strata had failed to provide substantial, material, and competent evidence that the proposed solar farm would not substantially injure the value of adjoining or abutting property.

On appeal, this Court concluded Petitioner had "produced substantial, material, and competent evidence to establish its *prima facie* case of entitlement for issuance of the conditional use permit." *Id.* at 327, 789 S.E.2d at 29. This Court also concluded the Board had "incorrectly implemented a 'burden of persuasion' upon Strata Solar after . . . it presented a *prima facie* case, rather than shifting the burden to the Intervenors-Respondents to produce rebuttal evidence contra to overcome Strata Solar's entitlement to the conditional use permit." *Id.* at 330, 789 S.E.2d at 30. This Court unanimously reversed the superior court's order and remanded the matter for further proceedings. *Id.* at 330-31, 789 S.E.2d at 31. The Intervenors filed a petition for discretionary review with the Supreme Court, which was denied. *Dellinger v. Lincoln Cty.*, 360 N.C. 190, 794 S.E.2d 324 (2016).

Upon remand, the Intervenors filed a motion to dismiss for lack of subject matter jurisdiction, due to Strata exiting from the solar farm project on Petitioners' land. Strata had sent notice of its intention to withdraw its application for the conditional use permit in February 2017. The superior court denied Intervenors' motion and remanded the matter to the Board, in accordance with this Court's opinion. Intervenors filed another motion to dismiss before the Board, which was also denied.

The Intervenors filed a motion to recuse Commissioner Mitchem. Petitioners filed a motion to recuse Commissioner Permenter. The Board denied both of the motions. The Board concluded Petitioners had established a *prima facie* case of entitlement to a conditional use permit, but the Intervenors had produced sufficient evidence *contra* to overcome it. By a 4-1 vote, the Board denied the application for the conditional use permit.

Petitioners appealed to the superior court. The superior court affirmed the Board's denial of Petitioners' motion to recuse Commissioner Permenter. The superior court concluded the Intervenors had presented

competent, material, and substantial evidence to rebut Petitioner's *prima facie* case and the Board's decision to deny the application for the conditional use permit was not arbitrary and capricious. The superior court affirmed the Board's decision. Petitioners appeal.

II. Jurisdiction

[1] Intervenors argue this matter should be dismissed for lack of subject matter jurisdiction, as Strata's withdrawal of its application renders this matter moot. This issue was raised before and denied by both the superior court and the Board. Intervenors failed to appeal the Board's denial of their motion to dismiss when this matter again returned to the superior court. Intervenors filed neither a motion to dismiss, a cross-appeal, nor a petition for writ of certiorari in this Court. However, "a party may present for review the question of subject matter jurisdiction by raising the issue in his brief." *Carter v. N.C. State Bd. for Prof'l Eng'rs*, 86 N.C. App. 308, 310, 357 S.E.2d 705, 706 (1987) (citing N.C. R. App. P. 10(a)).

N.C. Gen. Stat. § 160A-388, applied to counties under § 153A-345.1(a), provides that "[e]very quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2) (2017). This statute includes judicial review for the grant or denial of conditional use permits. *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 623, 265 S.E.2d 379, 381 (1980).

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Cook v. Union Cty. Zoning Bd. of Adjustment*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007) (citation omitted). N.C. Gen. Stat. § 160A-393 grants standing to "any person" who "[h]as an ownership interest in the property that is the subject of the decision being appealed" as well as "an applicant before the decision-making board whose decision is being appealed." N.C. Gen. Stat. § 160A-393(d)(1) (2017).

"Additionally, it is the general rule that once jurisdiction attaches, it will not be ousted by subsequent events." *Finks v. Middleton*, 251 N.C. App. 401, 408, 795 S.E.2d 789, 795 (2016) (citation and internal quotation marks omitted). "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding." *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123, 674 S.E.2d 775, 778-79 (2009) (citation omitted).

Both Strata and Petitioners had standing to appeal the quasi-judicial decision of the Board. N.C. Gen. Stat. § 160A-393(d)(1). Because Petitioners, as owners of the property, continue to seek appellate review and issuance of a conditional use permit for their property, this Court retains subject matter jurisdiction, and this matter is not moot. *See Finks*, 251 N.C. App. at 408, 795 S.E.2d at 795.

The order from the superior court is a final judgment and provides Petitioners with an appeal of right to this Court. N.C. Gen. Stat. § 7A-27(b) (2017).

III. Issues

Petitioners argue: (1) the denial of Petitioners' motion to recuse Commissioner Permenter deprived Petitioners of their constitutional right to a quasi-judicial proceeding before a fair and impartial decision-maker; and, (2) the Intervenors failed to produce competent, material, and substantial evidence contra to overcome Petitioners' *prima facie* showing of an entitlement to a conditional use permit.

IV. Standard of Review

"A legislative body such as the Board, when granting or denying a conditional use permit, sits as a quasi-judicial body." *Sun Suites Holdings, LLC v. Bd. of Aldermen*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527 (2000) (citation omitted). Its decisions are reviewable by the superior court sitting "as an appellate court, and not as a trier of facts." *Id.* (citations omitted).

"When a party alleges an error of law in the [Board's] decision, the reviewing court examines the record *de novo*, considering the matter anew." *Humane Soc'y of Moore Cty. v. Town of S. Pines*, 161 N.C. App. 625, 629, 589 S.E.2d 162, 165 (2003) (citations omitted). Whether competent, material, and substantial evidence was presented is a question of law, which is reviewed *de novo*. *Blair Invs., LLC v. Roanoke Rapids City Council*, 231 N.C. App. 318, 321, 752 S.E.2d 524, 527 (2013). "The [county's] ultimate decision about how to weigh that evidence is subject to whole record review." *Am. Towers, Inc. v. Town of Morrisville*, 222 N.C. App. 638, 641, 731 S.E.2d 698, 701 (2012).

"This Court's task on review of the superior court's order is twofold: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 23, 539 S.E.2d 18, 20 (2000) (citations and internal quotation marks omitted).

V. Analysis

A. Due Process Rights

[2] Petitioners assert the superior court erred by holding Petitioners' due process rights to an impartial hearing were not prejudiced by the participation, advocacy, and vote by Commissioner Permenter. We agree.

> A member of any board exercising quasi-judicial functions . . . shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision-maker. Impermissible violations of due process include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter.

N.C. Gen. Stat. §160A-388(e)(2) (2017).

"Governing bodies sitting in a quasi-judicial capacity are performing as judges and must be neutral, impartial, and base their decisions solely upon the evidence submitted." *PHG Asheville, LLC v. City of Asheville*, __ N.C. App. __, __, 822 S.E.2d 79, 85 (2018) (citation omitted). Board members acting in a quasi-judicial capacity are held to a high standard: "[n]eutrality and the appearance of neutrality are equally critical in maintaining the integrity of our judicial and quasi-judicial processes." *Handy v. PPG Indus.*, 154 N.C. App. 311, 321, 571 S.E.2d 853, 860 (2002).

A party who asserts a board member is biased against them may move for recusal. The burden is on the moving party to prove that, objectively, the grounds for disqualification exist. *See JWL Invs., Inc. v. Guilford Cty. Bd. of Adjustment*, 133 N.C. App. 426, 430, 515 S.E.2d 715, 718 (1999); *In re Ezzell*, 113 N.C. App. 388, 394, 438 S.E.2d 482, 485 (1994).

There is a "presumption of honesty and integrity in those serving as adjudicators on a quasi-judicial tribunal," but that presumption does not preclude a showing of demonstrated bias, mandating recusal. *In re N. Wilkesboro Speedway, Inc.*, 158 N.C. App. 669, 675, 582 S.E.2d 39, 43 (2003) (citations and internal quotation marks omitted).

> Bias has been defined as a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. Bias can refer to preconceptions about facts, policy or law; a person, group or object;

> or a personal interest in the outcome of some determination. However, in order to prove bias, it must be shown that the decision-maker has made some sort of commitment, due to bias, to decide the case in a particular way.

Id. at 676, 582 S.E.2d at 43 (citing *Smith v. Richmond Cty. Bd. of Educ.*, 150 N.C. App. 291, 299, 563 S.E.2d 258, 265-66 (2002), *overruled on other grounds*, *N.C. Dept. of Env't and Nat. Res. v. Carroll*, 388 N.C. 649, 599 S.E.2d 649 (2004)).

"[E]xposure to rumors is not, in and of itself, cause to believe that Board members have been biased" *Evers v. Pender Cty. Bd. of Educ.*, 104 N.C. App. 1, 16, 407 S.E.2d 879, 887 (1991). Also, "mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of Board members at a later adversary hearing." *Id.* at 18, 407 S.E.2d at 888 (citation omitted).

Richard Permenter was elected to the Board in November 2016. At the 5 June 2017 Board meeting, in response to Petitioner's challenge, he asserted, "I believe I absolutely can make a decision based on the evidence and I do not have nor do I approach this with a closed mind."

However, he also admitted that:

> During the initial application several years back and the later appeal, perhaps as recently as two years ago *I assisted in opposing the solar farm. I contributed financially. I expressed my opinion to others* and had discussions with both those in favor and those opposed to the matter. All of these actions took place while I was a private citizen. (Emphasis supplied).

Appellees argue Permenter had not demonstrated any bias *since becoming a commissioner*. However, the existence of bias alone can be disqualifying. The question is whether or not Permenter was able to set aside his previous "knowledge and preconceptions" regarding the case. *See Smith*, 150 N.C. App. at 299, 563 S.E.2d at 266.

Petitioners clearly demonstrated Permenter's bias based upon his actively opposing this specific conditional use application and appeal in the past, committing money to the cause of preventing them from obtaining the conditional use permit, and openly communicating his opposition to others. Permenter's bias is not based upon his general discussion of or attitude toward solar farms or conditional use permits, but his position, contributions, and activities involving the grant or denial

of *this* conditional use permit for Petitioner's proposed solar farm. Permenter's activities and positions proved he had a "commitment" to "decide the case in a particular way" or had a "financial interest in the outcome of the matter," mandating recusal. *See id.* at 299, 563 S.E.2d at 265-66; N.C. Gen. Stat. § 160A-388(e)(2).

The Intervenors assert Permenter's bias, and his refusal to recuse in light of a filed motion, is harmless error due to the Board's vote being 4-1 to deny the Dellingers' petition. We disagree.

During the 5 June 2017 Board meeting and while sitting on the Board hearing the matter, Permenter advocated and presented ten pages worth of his "condensed evidence" in an attempt to rebut Petitioners' *prima facie* case. This submission was made after another commissioner had already made a motion to deny the conditional use permit and had read the proposed order on the record. The "condensed evidence" advocated and presented by Permenter was biased, one-sided, and incomplete. "In quasi-judicial proceedings, no board or council member should appear to be an advocate for nor adopt an adversarial position to a party, bring in extraneous or incompetent evidence, or rely upon *ex parte* communications when making their decision." *PHG Asheville*, __ N.C. App. at __, 822 S.E.2d at 85.

As outlined below, a review of the whole record reveals insufficient evidence *contra* was presented to rebut Petitioners' *prima facie* showing. Permenter's biased recitation of his "condensed evidence" could have influenced the votes of the two other commissioners who also voted against issuing the permit after his presentation.

Permenter's bias and commitment to deny Petitioners' request for a conditional use permit is sufficient basis to reverse and remand. The error to allow his continued advocacy and involvement in sitting and ruling as a judge in the quasi-judicial process is compounded by the insufficient rebuttal evidence from Intervenors.

B. Failure to Rebut Prima Facie Case

[3] The Lincoln County Unified Development Ordinance requires an applicant to meet four conditions to be issued a conditional use permit:

> (1) The use will not materially endanger the public health or safety if located where proposed and developed according to the plan;
>
> (2) The use meets all required conditions and specifications;

> (3) The use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity; and
>
> (4) The location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and will be in general conformity with the approved Land Development Plan for the area in question.

Dellinger, 248 N.C. App. at 319, 789 S.E.2d at 24.

As stipulated and noted in the prior opinion, Petitioner's compliance with conditions (1), (2), and (4) are not disputed. In the prior appeal, this Court also concluded Petitioners had met their *prima facie* showing on condition (3) to warrant entitlement to a conditional use permit. *Id.* at 327, 789 S.E.2d at 29. Both the Board and the superior court acknowledged Petitioners had carried their burden to warrant issuance of the permit.

The remaining question is whether the Intervenors produced sufficient evidence *contra* to rebut Petitioners' *prima facie* showing.

"[G]overnmental restrictions on the use of land are construed strictly in favor of the free use of real property." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 157, 712 S.E.2d 868, 871 (2011).

> When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Humble Oil & Ref. Co. v. Bd. of Aldermen, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974).

"Material evidence has been recognized by this Court to mean [e]vidence having some logical connection with the facts of consequence or issues. Substantial evidence has been defined to mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *PHG Asheville*, __ N.C. App. at __, 822 S.E.2d at 84 (quoting *Innovative 55, LLC v. Robeson Cty.*, __ N.C. App. __, __, 801 S.E.2d 671, 676 (2017)) (internal quotation marks omitted).

In concluding the Intervenors presented and carried their burden of sufficient evidence to rebut Petitioners' *prima facie* showing of entitlement to issuance, and that the proposed solar farm would materially and substantially injure the value of adjoining or abutting property, the Board relied upon the following evidence, which had been introduced at the previous hearing.

Geoffrey Zawtocki, a certified real estate appraiser, presented written and testimonial evidence of 42 other solar energy sites in North Carolina. He compared the average median housing values, housing density, and household income within a one-mile radius of those 42 solar farms to those values within a one-mile radius of the proposed site. Zawtocki stated the proposed project was "not typical" to the comparables because of the higher median housing values, housing density, and household income in the area surrounding the proposed site.

Zawtocki presented evidence of Tusquittee Trace, a 15-lot subdivision in Clay County, North Carolina. Sales of the lots were slow, due to the 2008 housing crash and following financial crisis, but three lots were sold between 2009 and 2010. In 2011, a solar farm was constructed and no further lots were sold. The solar farm can be seen on the road leading up to the subdivision, and is visible from some of the lots. Zawtocki testified the potential buyers wanted unimpaired views.

Zawtocki presented evidence of reduced property tax assessments in Clay County. In 2011, when residents voiced their concerns over the effect of adjoining or abutting solar farms, the Board of Equalization reduced the proposed assessments on nineteen properties by approximately 30%. Twelve of these nineteen addresses were located in Tusquittee Trace.

Zawtocki also provided evidence of a residential community located in Elgin, South Carolina, which has median home values comparable to the communities surrounding the proposed site. In 2010, Verizon built a call center facility along the road leading to the community. Using a matched pair sales analysis, of the sales that occurred prior to the call center being built, all had experienced appreciation, ranging between 9.6 to 27.5%. Of the five matched sales occurring after the call center was built, all had experienced depreciation, ranging from 10.7 to 23%. Zawtocki concluded the only change affecting the housing values, other than overall market or competitive forces, was the addition of the call center.

Martha McLean testified that she owned property on Burton Lane, which would adjoin the proposed solar farm. Prior to Petitioner's application for a conditional use permit, McLean and her husband had entered into a contract to sell the property for $200,000.00. When the

purchasers were informed of the proposed solar farm, they terminated their contract to purchase the property. McLean has not had any subsequent interest in the property.

The superior court reviewed the Board's conclusion under the "whole record test." Petitioners assert the opponents failed to present competent, material, and substantial evidence, which would necessitate a *de novo* review. Respondents assert N.C. Gen. Stat. § 160A-393(k)(3), applicable to counties through N.C. Gen. Stat. § 153A-349, provides that competent evidence "shall not preclude reliance by the decision-making board on evidence that would not be admissible under the rules of evidence as applied in the trial division of the General Court of Justice if (i) the evidence was admitted without objection[.]" N.C. Gen. Stat. § 160A-393(k)(3) (2017). Petitioners did not object to the evidence above.

Even if the evidence presented is deemed competent, Intervenors failed to present substantial evidence *contra* to carry their burden to rebut Petitioners' *prima facie* showing of entitlement to a conditional use permit. "[T]he superior court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Little River, LLC v. Lee Cty.*, __ N.C. App. __, __, 809 S.E.2d 42, 50 (2017) (citing *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). The Board and the superior court wholly and erroneously ignored competent, material, and substantial evidence that challenged and contradicted the Intervenors' rebuttal burden.

The written reports produced for the Intervenors negate a conclusion that they carried their burden and presented substantial and material evidence to rebut Petitioner's *prima facie* case. Concerning the solar farm in Clay County, it is undisputed that no zoning, setback, landscaping, or other restrictions existed to regulate the appearance of solar farms at the time of its construction.

Half of the interviewed real estate agents in Clay County opined that a properly buffered and concealed solar farm would not affect the property values. In their opinion, value would only be impacted by a view impaired by, and not by the mere presence of, a solar farm.

Zawtocki, in an effort to analogize the proposed solar farm to the one in Clay County, provided renderings of the proposed solar farm in which it, and the chain-link fence surrounding it, were extremely visible. These renderings wholly ignored the proposed landscaping and buffering Petitioners had included in their application. Commissioner Mitchem referred to these non-landscaped chain-link fence renderings as "misleading."

Concerning the use of Clay County property tax records to support a decline in valuation, "[o]ur Supreme Court has held that *ad valorem* tax records are not competent to establish the market value of real property." *Edwards v. Edwards*, 251 N.C. App. 549, 551, 795 S.E.2d 823, 825 (2017) (citing *Star Mfg. Co. v. Atlantic Coast Line R.R.*, 222 N.C. 330, 332-33, 23 S.E.2d 32, 36 (1942); *Bunn v. Harris*, 216 N.C. 366, 373, 5 S.E.2d 149, 153 (1939); *Hamilton v. Seaboard*, 150 N.C. 193, 194, 63 S.E. 730, 730 (1909); *Cardwell v. Mebane*, 68 N.C. 485, 487 (1873)).

The admitted opinions and reports of the expert appraisers were also misconstrued or ignored. The appraisers for Petitioners and for Intervenors all concluded in their written reports that the presence of a solar farm does not affect the value of homes valued in the range of $220,000.00 to $240,000.00. This unanimous market data refutes Ms. McLean's testimony concerning the effect of the proposed solar farm on the sale of her property, as her home is valued in or near that range. Petitioners' expert testified that single market transactions are insufficient to establish market values. Ms. McLean's testimony of a single market transaction is insufficient to rebut the otherwise unanimous market data.

Fred Beck, a certified real estate appraiser, opined the proposed solar farm would impact property values. When questioned about his and other appraisers' previous, opposing assertions, he responded:

> We can match pairs. I can prove anything. Mr. Kirkland can prove anything. Damon can prove anything that you want to.
>
> Logic would tell you that this is going to hurt these people's value.
>
> . . .
>
> And my common sense tells me, after being in this business for 30 years, my heart and my common sense tells me that this is going to hurt these people, and it's going to hurt them badly.

Though Mr. Beck qualifies as an expert on real estate valuation, his "mere expression of [personal] opinion" is insufficient to impeach or rebut the quantitative analysis contained in the written reports, one of which he produced. S*ee Cumulus Broad., LLC v. Hoke Cty. Bd. of Comm'rs*, 180 N.C. App. 424, 430, 638 S.E.2d 12, 17 (2006).

"Speculative opinions that merely assert generalized fears about the effects of granting a conditional use permit for development are not

considered substantial evidence to support the findings [to deny the permit]." *Humane Soc'y of Moore Cty.*, 161 N.C. App. at 631, 589 S.E.2d at 167. "Without specific, competent evidence to support [Mr. Beck's] generalized fears, this evidence does not rebut Petitioner's *prima facie* showing." *Little River, LLC*, __ N.C. App. at __, 809 S.E.2d at 50.

The evidence presented by the Intervenors and relied upon by the Board in denying Petitioners' conditional use permit under condition (3), "[t]he use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity" is insufficient to rebut Petitioners' *prima facie* showing of entitlement to issuance of the permit. *Id.*

VI. Conclusion

Petitioners clearly demonstrated Commissioner Permenter's bias to mandate recusal based upon his actively opposing the application, committing money to the cause of defeating the application for this solar farm, and openly communicating his fixed opposition on this application to others. Permenter assumed the role of an advocate at the quasi-judicial hearing by presenting ten pages worth of "condensed evidence" in an attempt to rebut Petitioners' *prima facie* case while also sitting, discussing, and voting on Petitioners' application.

The evidence presented by the Intervenors failed to rebut Petitioners' *prima facie* showing of entitlement to a conditional use permit. Because the superior court and Board concluded Petitioners have made a *prima facie* showing on all four conditions, as set forth in the ordinance, we reverse the trial court's order and remand for issuance of Petitioners' conditional use permit. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge McGEE concurs.

Judge BERGER concurs with separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority but write separately concerning Commissioner Permenter's pre-oath activity.

The majority rightly focused on the actions of Commissioner Permenter *during the hearing* that support a finding of bias in this

case. However, the majority additionally concluded that Commissioner Permenter's conduct prior to joining the Board was also disqualifying.

I do not agree that the actions of a candidate or private citizen, prior to taking office, could alone establish bias and disqualify him from performing his duties as an elected official. Civic engagement has long been a hallmark of our country. Exchange of information in the marketplace of ideas is critical to fostering discussion and shaping the future. A candidate's expression of a particular viewpoint made prior to taking office should not prohibit him as an elected official from discharging his duty to thoughtfully consider matters that come before him after taking an oath of office.

An opinion voiced in an unofficial capacity, however forceful or persuasive, does not in itself hamstring one's ability to be impartial. In response to the Majority Opinion, the prudent candidate for commissioner will hide behind the phrase, "I am sorry, but I am not permitted to discuss my position on the issues or matters, which may come before me in a quasi-judicial setting." Commissioner races will become as boring as judicial races.

Every elected official was at one point a candidate, and every candidate was once a private citizen with beliefs about what is best for his community. Candidates should be encouraged to state their positions on issues of public importance, and this Court should not preclude candidates from sharing their ideas in the public square.

> [T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.

Republican Party of Minn. v. White, 536 U.S. 765, 781-82 (2002) (citations and quotation marks omitted).

Citizens should be knowledgeable about issues that have or will affect their community, and they should be encouraged to share that knowledge. Labeling an elected official as biased based upon communications made before taking office curtails public involvement and threatens free speech.

IN RE ADOPTION OF K.L.J. AND K.P.J.

No. COA17-1390-2

Filed 16 July 2019

1. Native Americans—Indian Child Welfare Act—jurisdiction—status as wards—adoption proceeding

The trial court did not err by asserting jurisdiction over an adoption of Indian children where the children were not wards of the Tribal Court and did not meet other criteria in the Indian Child Welfare Act (25 U.S.C. § 1911(a)). There was no evidence that the children received housing or other protections and necessities from the Tribe, and their aunt, who previously had custody of the children, had sought and obtained guardians for them from the courts of North Carolina.

2. Native Americans—Indian Child Welfare Act—Tribal Court's order—full faith and credit—authentication—due process

The trial court did not err by declining to give full faith and credit to a Tribal Court's purported order stating that it had exclusive jurisdiction over two Indian children as wards of their tribe, where the order was not properly authenticated and any hearing from which the purported order originated was conducted without notice or an opportunity to be heard—both as to the legal guardians who sought to adopt the children and to the children themselves.

Judge ARROWOOD concurring in the result without separate opinion.

Appeal by Proposed Intervenor from disposition order entered 18 August 2018 by Judge Melinda H. Crouch in New Hanover County District Court. Originally scheduled for hearing in the Court of Appeals 7 August 2018. By order issued 27 July 2018, this Court dismissed this appeal pursuant to Rule 37(a) of our Rules of Appellate Procedure. Upon review granted by the Supreme Court of North Carolina and by order dated 5 December 2018, the Supreme Court vacated our order dismissing the appeal, and remanded to the Court of Appeals with special instructions. Heard in the Court of Appeals 28 March 2019.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for the intervenor-appellant.

Bobby D. Mills for the petitioners-appellees.

LeeAnne Quattrucci for the Guardian Ad Litem.

MURPHY, Judge.

The New Hanover County District Court ("the District Court") did not err in asserting jurisdiction over the adoption of two "Indian children," K.L.J. and K.P.J., subject to the federal Indian Child Welfare Act ("ICWA"). Additionally, the District Court did not err in electing not to give full faith and credit to the Cheyenne River Sioux Tribal Court's ("Tribal Court") determination that Appellant is an "Indian Custodian," as defined by ICWA, entitled to the return of the two children. We affirm the District Court's *Order and Judgment*.

BACKGROUND

This is an appeal from the District Court's *Order and Judgment* entering Decrees of Adoption declaring both K.L.J. and K.P.J. adopted by the Petitioners-Appellees. Both children were born in South Dakota—K.L.J. in 2006 and K.P.J. in 2009—to a father who is a member of the Cheyenne River Sioux Tribe and are, themselves, members of the same. Shortly after K.P.J. was born the Minnehaha Department of Social Services in Sioux Falls, South Dakota took custody of both children due to their parents' drug and alcohol abuse. K.L.J. and K.P.J.'s biological parents had their parental rights to the children terminated in 2011. Pursuant to ICWA, the Tribal Court assumed jurisdiction over the children's custody proceeding and placed them in the care of "paternal aunt, Jean Coffman," the Appellant in this matter, ordering the children's case closed and dismissed.

About three months later, Appellant entered into a *Temporary Guardianship Agreement* in New Hanover County wherein both children were placed with Appellees, the Petitioners below, for six months or "as long as necessary, beginning on [17 January] 2013." Subsequently, Appellees were appointed K.L.J. and K.P.J.'s legal guardians by the Clerk of Superior Court of New Hanover County ("the Clerk"). In November 2015, Appellees filed petitions in New Hanover County to adopt K.L.J. and K.P.J.

Neither Appellant nor the Cheyenne River Sioux Tribe were served with the adoption petitions or given notice of the filings at the time they were made. However, two weeks after filing, Appellees served the Tribe with copies of the petitions by certified mail pursuant to an order of the

Clerk. Part of this notice advised the Tribal Court that, if it wished "to participate [in the adoption proceedings, it was] required and directed to make defense of such pleadings by filing a response to the petition . . . within thirty (30) days of the receipt [of] this notice in order to participate in and to receive further notice of the proceedings[.]" The Tribal Court did not take any action relating to the adoption proceeding within the thirty-day period.

Two months after filing the adoption petitions, Appellees—at the request of the Clerk of Court—gave formal notice to Appellant, who then attempted to intervene in the adoption by requesting "the immediate return of the minor Indian Child[ren] to her physical custody pursuant to the Tribal Custody Order . . . ." Appellant also moved to vacate New Hanover's order appointing Appellees as guardians of K.L.J. and K.P.J. At a hearing before the Clerk in March 2016, Appellant's motion was denied, and the matter was transferred to District Court to resolve the issue of whether North Carolina has jurisdiction over the adoption. The hearing in District Court was held on 16 June 2016.

Prior to the hearing in District Court, Appellant filed an ex parte motion with the Tribal Court on 2 May 2016, in which she asked it to assert jurisdiction over the adoption of K.L.J. and K.P.J. The record also includes what appears to be a faxed copy of what purports to be an *Order of Jurisdiction* issued by the Tribal Court in response to Appellant's 2 May 2016 motion wherein the Tribal Court asserts: (1) K.L.J. and K.P.J. are "Wards of the Cheyenne River Sioux Tribe until the age of 18 years;" (2) Appellant is the children's "Indian Custodian[;]" and (3) that it has "exclusive jurisdiction according to ICWA[.]" Both Appellant's motion and the faxed copy of the Tribal Court's *Order of Jurisdiction* are included in the Record as "Proposed Intervenor's Exhibits for June [16,] 2016 District Court hearing[.]" Neither was admitted into evidence during the 16 June 2016 hearing after Appellees objected to their admission.

After hearing arguments from both parties, the District Court entered Findings of Fact and Conclusions of Law on the record and memorialized in an *Order and Judgment* filed 18 August 2016. In relevant part, the District Court concluded "[t]hat this Court has jurisdiction to enter orders with regards to the adoption," and ordered "[t]hat Decrees of Adoption are hereby entered as to [K.P.J.] and [K.L.J.]"

ANALYSIS

In light of our Supreme Court's 5 December 2018 order, the two issues before us are: (1) whether it was error for the District Court to assert jurisdiction over an adoption of "Indian children" covered by ICWA, and

(2) whether the District Court erred in failing to give full faith and credit to the Tribal Court's purported 2016 determination that Appellant is an "Indian Custodian" of the children entitled to their return.

"In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*." *In re: K.A.D.*, 187 N.C. App. 502, 503, 653 S.E.2d 427, 428 (2007). Similarly, "We review *de novo* the issue of whether a trial court has properly extended full faith and credit to a foreign judgment." *Marlin Leasing Corp. v. Essa*, ___ N.C. App. ___, ___, 823 S.E.2d 659, 662-63 (2019) (citing *Tropic Leisure Corp. v. Hailey*, 251 N.C. App. 915, 917, 796 S.E.2d 129, 131 (2017), *appeal dismissed and disc. review denied*, 369 N.C. 754, 799 S.E.2d 868, *cert. denied*, ___ U.S. ___, 199 L. Ed. 2d 385 (2017)). After exhaustive review of the record, we affirm the District Court's *Order and Judgment* declaring K.L.J. and K.P.J. the adoptive children of the Appellees.

A. Subject Matter Jurisdiction

[1] Appellant contends the District Court erred in asserting jurisdiction over an adoption of "Indian children" because the tribal court initially exercising jurisdiction continued to assert jurisdiction. However, the Tribal Court did not continue to assert jurisdiction so much as it reasserted jurisdiction during the pendency of this action. Given our standard of review, we must determine de novo whether the District Court erred in concluding "grounds exist sufficient to give [the District Court] jurisdiction over this matter to enter an order approving the adoption of these children by the [Appellees]."

In relevant part, ICWA establishes a tribal court will have exclusive jurisdiction:

> [A]s to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

25 U.S.C. § 1911(a) (2019). This provision grants tribal courts exclusive jurisdiction over child custody proceedings in three instances: (1) over an Indian child who resides within the reservation; (2) over an Indian child domiciled within the reservation; and (3) over an Indian child who is a ward of the tribal court. Here, the children did not reside on the reservation and were not domiciled therein at the time this matter arose, so the only way the Tribal Court could have exclusive jurisdiction over this

matter is if the children were its wards. Based on the record, we cannot conclude the children were wards of the Tribal Court and hold the provisions of ICWA do not grant the Tribal Court exclusive jurisdiction over the adoption of K.L.J. and K.P.J.

ICWA and the related sections of the Code of Federal Regulations do not instruct as to who should make a finding regarding a child's status as a tribal court's ward and North Carolina does not use the term "ward" in the context of adoptions.[1] Black's Law Dictionary defines a "ward" as "a person, usu[ally] a minor, who is under a guardian's charge or protection." *Ward*, Black's Law Dictionary (11th ed. 2019). More specifically, Black's defines "ward of the state" as "[s]omeone who is housed by, and receives protection and necessities from, the government." *Ward of the State*, Black's Law Dictionary (11th ed. 2019). For purposes of ICWA, we adopt this definition for the term "Tribal Court Ward." Applying this definition to the relevant provision of ICWA, once a child has stopped being housed by or provided protections and necessities from the tribe, she will cease being its ward for purposes of 25 U.S.C. § 1911(a).

In 2011, South Dakota DSS was granted full custody of the children. In 2012, the Tribe was granted renewed jurisdiction over the children's case and placed the children in the care of their "paternal aunt," Appellant. There is no evidence the children ever made the reservation their domicile or residence after that point in time, nor is there evidence the Tribe housed them or provided protections or necessities thereafter. In fact, the Appellant sought and obtained guardians for the children from the courts of North Carolina. Having lived most of their life outside the Tribe's reservation and without provision of protections and necessities therefrom, we hold K.L.J. and K.P.J. were not wards of the Tribal Court. The Tribal Court cannot assert exclusive jurisdiction over this matter under 25 U.S.C. § 1911(a).

Appellant's argument that the children are Tribal Court wards is based entirely upon the Tribal Court's *Order of Jurisdiction*. In an order purportedly entered two days prior to the District Court's adoption order, the Tribal Court concluded it had exclusive jurisdiction over the children as "Wards of the Cheyenne River Sioux Tribe until the age of 18 years[.]" Appellant argues the District Court disregarded that Order despite ICWA's mandate that our State's courts "shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian

1. In contrast, effective 12 December 2016, "The Indian Tribe of which it is believed the child is a member . . . determines whether the child is a member of the Tribe[,]" and "[that] determination . . . is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law." 25 C.F.R. § 23.108(a)-(b) (2016).

tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity." 25 U.S.C. § 1911(d) (2019). However, as is described in greater detail below, the Order in question was not authenticated and there is nothing in the record to assure us of (1) its validity or (2) compliance with the Due Process Clause. The District Court did not err in asserting subject matter jurisdiction over the adoption of K.L.J. and K.P.J.

B. Full Faith and Credit

[2] Under ICWA, every state "shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity." 25 U.S.C. § 1911(d). The District Court seemingly disregarded the Tribal Court's purported 14 June 2016 *Order of Jurisdiction* in reaching its decision in this matter and did not adopt the conclusions therein. Importantly, the Tribal Court concluded (1) K.L.J. and K.P.J. were wards of the tribal court and (2) Appellant was their "Indian Custodian," and therefore entitled to the children's return. The District Court concluded otherwise, and Appellant argues it erred in failing to give full faith and credit to the Tribal Court's *Order of Jurisdiction*.

"We review *de novo* the issue of whether a trial court has properly extended full faith and credit to a foreign judgment." *Marlin Leasing Corp.*, ___ N.C. App. at ___, 823 S.E.2d at 662-63. In deciding what weight, if any, we must give the Tribal Court's *Order of Jurisdiction*, we are persuaded by our caselaw regarding foreign judgments. "[A] foreign state's judgment is entitled to only the same validity and effect in a sister state as it had in the rendering state[.]" *Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv., Inc.*, 113 N.C. App. 476, 478, 439 S.E.2d 221, 223, *disc. review denied*, 336 N.C. 314, 445 S.E.2d 392 (1994). "The [Uniform Enforcement of Foreign Judgments Act ("UEFJA")] 'governs the enforcement of foreign judgments that are entitled to full faith and credit in North Carolina.' " *Tropic Leisure Corp.*, 251 N.C. App. at 917, 796 S.E.2d at 131 (citing *Lumbermans Fin., LLC v. Poccia*, 228 N.C.App. 67, 70, 743 S.E.2d 677, 679 (2013)).

Under the UEFJA, to domesticate a foreign judgment the party seeking to enforce the judgment "must file a properly authenticated foreign judgment with the office of the [C]lerk of [S]uperior [C]ourt in any North Carolina county along with an affidavit attesting to the fact that the foreign judgment is both final and unsatisfied in whole or in part and setting forth the amount remaining to be paid on the judgment." *Id.*; *see*

N.C.G.S. § 1C–1703(a) (2017). Here, no such filing was made with any North Carolina court—including ours—and the only copy of the Tribal Court's purported Order we have is the unauthenticated copy included in the Record as part of the "Proposed Intervenor's Exhibits for June 15, 2016 District Court hearing[.]"

As in *Tropic Leisure Corp.*, we are concerned about the Due Process implications of giving full faith and credit to the Tribal Court's Order. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 32 (1976) (internal citation and quotation marks omitted). There is nothing in the record indicating Appellees were given notice of the Tribal Court proceedings or an opportunity to be heard in the Tribal Court. Indeed, Appellees made this argument at the 16 June 2016 hearing, and the Order was not admitted as a result. Additionally, the interests of K.L.J. and K.P.J. were not represented in the Tribal Court by a Guardian Ad Litem, and the juveniles were not afforded Due Process at the alleged 14 June 2016 hearing in the Tribal Court.

We hold the District Court did not err in its treatment of the Tribal Court's purported 14 June 2016 *Order of Jurisdiction*, which was not presented as a properly authenticated document. To the extent a hearing was conducted in the Tribal Court, we hold it did not comply with the basic tenants of our Due Process jurisprudence because no party besides Appellant was given notice of the proceeding or an opportunity to be heard. In addition to the parties, K.L.J. and K.P.J. were not afforded Due Process at the alleged 14 June 2016 Tribal Court hearing. Due Process will not allow the best interests of the children to be silenced.

CONCLUSION

The District Court did not err in asserting jurisdiction over the adoption of K.L.J. and K.P.J. because the relevant section of ICWA and associated regulations did not confer exclusive jurisdiction upon the Tribal Court. Additionally, the District Court did not err in failing to give full faith and credit to an unauthenticated order purportedly entered by the Tribal Court two days prior to the hearing at issue without providing Due Process to the Appellees or the unrepresented children.

AFFIRMED.

Chief Judge McGEE concurs.

Judge ARROWOOD concurs in the result without separate opinion.

MARTIN v. MARTIN

[266 N.C. App. 296 (2019)]

ERIN LYNN MARTIN, PLAINTIFF
v.
SHAWN MICHAEL MARTIN, DEFENDANT

No. COA18-465-2

Filed 16 July 2019

1. Domestic Violence—notice of allegations—adequacy

The trial court erred by admitting testimony supporting allegations of domestic violence by defendant-husband that were not pleaded in plaintiff-wife's complaint. Civil Procedure Rule 8 requires that defendants receive adequate notice of the allegations against them, and the complaint gave defendant no notice that his aggressive driving would be at issue in the hearing.

2. Domestic Violence—sufficiency of findings—anger, fear, and email hacking

The trial court's findings of fact that defendant-husband had a "flashpoint" temper, that plaintiff-wife feared what defendant might do, and that defendant hacked into plaintiff's email did not support a conclusion that defendant had committed an act of domestic violence.

Appeal by defendant from orders entered 12 September 2017 by Judge Margaret P. Eagles in Wake County District Court. Heard in the Court of Appeals 31 October 2018. Petition for Rehearing allowed 8 February 2019. The following opinion supersedes and replaces the prior opinion filed 18 December 2018.

Gailor Hunt Jenkins Davis Taylor & Gibbs, PLLC, by Jonathan S. Melton and Stephanie J. Gibbs, for plaintiff-appellee.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia J. Jurney and Kristin H. Ruth, for defendant-appellant.

ZACHARY, Judge.

Shawn Michael Martin ("Defendant-Husband") appeals from a Domestic Violence Order of Protection and an Amended Domestic Violence Order of Protection. For the reasons stated herein, we reverse the orders entered against Defendant-Husband.

I. Background

Erin Lynn Martin ("Plaintiff-Wife") and Defendant-Husband are the parents of two minor children. The family moved to North Carolina from the State of Washington on 29 May 2017.

About a month later, on 3 July 2017, Plaintiff-Wife filed a Complaint and Motion for Domestic Violence Protective Order alleging that Defendant-Husband committed acts of domestic violence against Plaintiff-Wife and their children. That same day, the trial court entered an Ex Parte Domestic Violence Order of Protection. Defendant-Husband filed an answer on 23 August 2017 denying all allegations of domestic violence.

Plaintiff-Wife's motion was heard on 12 September 2017 before the Honorable Margaret P. Eagles in Wake County District Court. Following the hearing, the trial court entered a Domestic Violence Order of Protection against Defendant-Husband. Shortly thereafter, the parties came to an agreement concerning custody of the children, and the trial court entered an Amended Domestic Violence Order of Protection. The trial court granted temporary legal and physical custody of the children to Plaintiff-Wife and visitation privileges to Defendant-Husband. Defendant-Husband timely appealed two days later, on 14 September 2017.

At the time of the hearing, dual custody proceedings were pending in Washington and in North Carolina. The Washington custody proceeding was scheduled for 21 September 2017, nine days after the domestic violence protective orders were filed. On 17 April 2018, the trial court entered a consent order settling the record on appeal, but no information concerning subsequent custody proceedings in either state was included in the record.

In his brief to this Court, Defendant-Husband asserted that we have "never addressed whether a plaintiff seeking a protective order may present evidence of specific acts not raised in any court filing prior to trial," allegations of which the defendant received no notice. Plaintiff-Wife did not dispute Defendant-Husband's assertion that this case presented an issue of first impression, but argued that Defendant-Husband's due process rights were not violated by any alleged lack of notice.

This Court issued its opinion in this case on 18 December 2018, concluding that the trial court violated Defendant-Husband's due process rights "by allowing Plaintiff-Wife to present evidence of alleged acts of domestic violence not specifically pleaded in her Complaint."

Martin v. Martin, ___ N.C. App. ___, ___, 822 S.E.2d 756, 758 (2018) ("*Martin I*"). Accordingly, we reversed the domestic violence protective orders entered against Defendant-Husband and remanded this matter to the trial court for further proceedings. *Id.* at ___, 822 S.E.2d at 762. After the mandate issued, but within the time allowed by N.C.R. App. P. 31, Plaintiff-Wife filed a petition for rehearing, requesting that the Court reconsider its ruling in light of *Jarrett v. Jarrett*, 249 N.C. App. 269, 790 S.E.2d 883, *disc. review denied*, 369 N.C. 194, 793 S.E.2d 259 (2016), in which this Court addressed the sufficiency of notice of domestic violence allegations.[1] We allowed Plaintiff-Wife's petition for rehearing on 8 February 2019. This opinion replaces and supersedes *Martin I*; therefore, we will reconsider the issues raised in the parties' briefs.

II. Discussion

Defendant-Husband argues that the trial court erred by: (1) allowing Plaintiff-Wife to present evidence of alleged incidents of domestic violence of which Defendant-Husband did not receive notice before trial, in violation of his due process rights; (2) "entering a domestic violence protective order against Defendant[-Husband] without concluding as a matter of law that an act of domestic violence had occurred"; and (3) entering a child custody order when the trial court lacked subject matter jurisdiction to do so.

A. Unpleaded Allegations of Domestic Violence

[1] Defendant-Husband first argues on appeal that the trial court erred by admitting testimony supporting allegations of domestic violence not pleaded in Plaintiff-Wife's complaint, and that the admission of that testimony violated his due process rights.

"[A]ppellate courts must avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (quotation marks omitted), *reconsideration denied*, 359 N.C. 633, 613 S.E.2d 691 (2005). The question of whether a trial court can properly admit evidence in support of unpleaded allegations of domestic violence may be answered by reference to our Rules of Civil Procedure.

North Carolina remains a notice-pleading state, which means that a pleading filed in this state must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or

1. Neither party cited *Jarrett* in their briefs to this Court.

occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2017). "A complaint is adequate, under notice pleading, if it gives a defendant sufficient notice of the nature and basis of the plaintiff's claim and allows the defendant to answer and prepare for trial." *Burgess v. Busby*, 142 N.C. App. 393, 399, 544 S.E.2d 4, 7, *disc. review improvidently allowed*, 354 N.C. 351, 553 S.E.2d 679 (2001). While Rule 8 "does not require detailed fact pleading, . . . it does require a certain degree of specificity . . . [, and] sufficient detail must be given so that the defendant and the Court can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for [relief]." *Manning v. Manning*, 20 N.C. App. 149, 154, 201 S.E.2d 46, 50 (1973).

This Court has previously recognized that the entry of a domestic violence protective order "involves both legal and non-legal collateral consequences." *Mannise v. Harrell*, 249 N.C. App. 322, 332, 791 S.E.2d 653, 660 (2016). For instance, "[a] domestic violence protective order may . . . place restrictions on where a defendant may or may not be located, or what personal property a defendant may possess or use." *Id.* Additionally, the existence of a prior domestic violence protective order may be "consider[ed] . . . by the trial court in any custody action involving [the] [d]efendant." *Smith v. Smith*, 145 N.C. App. 434, 436, 549 S.E.2d 912, 914 (2001).

The defendant may also suffer "non-legal collateral consequences" as a result of "the stigma that is likely to attach to a person judicially determined to have committed domestic abuse." *Id.* at 437, 549 S.E.2d at 914 (brackets and quotation marks omitted). For example, this Court has recognized that "a person applying for a job, a professional license, a government position, admission to an academic institution, or the like, may be asked about whether he or she has been the subject of a domestic violence protective order." *Id.* (brackets omitted). Because of the potential significant and lasting adverse collateral consequences faced by those against whom a domestic violence protective order is entered, it is imperative that a defendant receive adequate notice of the allegations in the complaint.

A trial court does not err by admitting evidence in support of unpleaded domestic violence allegations, so long as the allegations in the complaint provide sufficient notice of the nature and basis of any unpleaded allegations. *See Jarrett*, 249 N.C. App. at 276-77, 790 S.E.2d at 888. For instance, in *Jarrett*, the plaintiff filed a complaint on 20 July 2015 alleging domestic violence and claiming that in May 2015, the defendant "followed [the plaintiff] on the highway, cut her off, and

slammed on his brakes." *Id.* at 276, 790 S.E.2d at 888. The defendant had also committed similar incidents of aggressive driving in March and June of 2015; however, the plaintiff's complaint only alleged the May 2015 incident. *Id.* The plaintiff did file an amended complaint on 24 July 2015 alleging the March and June incidents, but did not serve the defendant with the amended complaint until the day of the hearing. *Id.* at 277, 790 S.E.2d at 888. At the hearing, the plaintiff testified about all three incidents of aggressive driving. *Id.* at 276, 790 S.E.2d at 888. The defendant argued to this Court that the trial court should not have permitted the plaintiff to testify about alleged incidents of domestic violence not pleaded in her original complaint. *Id.* However, applying Rule 8, this Court concluded that the "plaintiff's 20 July 2015 complaint gave [the] defendant sufficient notice of the nature and basis of her claim." *Id.* at 277, 790 S.E.2d at 888. Indeed, the defendant did "not argue that he was unable to prepare a responsive pleading or that he was unable to prepare for the hearing." *Id.* Thus, the plaintiff's allegation of one incident of aggressive driving in July 2015 provided the defendant with sufficient notice of the plaintiff's unpleaded allegations arising from similar incidents in March and June 2015, as his aggressive driving was the nature and basis of the plaintiff's complaint.

In this case, the trial court found, in both of its domestic violence protective orders, that Defendant-Husband placed Plaintiff-Wife in fear of imminent bodily injury and continued harassment that rose to such a level as to inflict substantial emotional distress. Specifically, the trial court found that

> defendant was listening to plaintiff outside her bedroom door, then after plaintiff locked the door, defendant repeatedly pounded on the door and broke into plaintiff's bedroom, causing her fear of physical assault; on 6/30/2017, defendant threw keys at plaintiff and yelled profanity at her; defendant has a "flashpoint" temper (per testimony) and engages in excessively aggressive driving while plaintiff and children are in the car, causing plaintiff fear; plaintiff was afraid of defendant and what he might do; since the filing of DVPO, defendant has hacked into plaintiff's email account, which has caused her emotional distress[.]

Based on our review of the record, the trial court heard testimony of a significant number of unpleaded allegations of domestic violence; however, the trial court only made findings about three of those unpleaded allegations in concluding that Defendant-Husband committed domestic violence. Those unpleaded allegations include: (1) "defendant . . . engages in excessively aggressive driving while

plaintiff and children are in the car, causing plaintiff fear"; (2) "defendant was listening to plaintiff outside her bedroom door, then after plaintiff locked the door, defendant repeatedly pounded on the door and broke into plaintiff's bedroom, causing her fear of physical assault"; and (3) "defendant has hacked into plaintiff's email account, which has caused her emotional distress."

It is well established that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). Of the unpleaded allegations of domestic violence, Defendant-Husband only objected to the testimony concerning aggressive driving:

> [Plaintiff's Counsel:] Now, [Defense Counsel] asked you about whether [Defendant-Husband] had physically harmed you. Did he ever put you and the children in harm's way?
>
> [Plaintiff-Wife:] Yes.
>
> Q. When?
>
> A. [Defendant-Husband] had a lot of road rage, a lot of road rage, and we basically couldn't drive to the store without him racing somebody or cutting somebody off.
>
> [Defense Counsel:] I'm going to object to that. That's way outside. There's nothing within the scope of the domestic violence—what she filed.
>
> [Plaintiff's Counsel:] It's within the scope of her questioning. I'm cross-examining her.
>
> [Defense Counsel:] (Interjecting) She said he had never done anything but touched her one time.
>
> [Plaintiff's Counsel:] You know, Your Honor, I'm just trying to talk here.
>
> THE COURT: I know. I'm going to allow the question. Go ahead.

Because defense counsel objected to this testimony, and because the trial court used this unpleaded allegation of domestic violence as a basis for its decision to grant the protective order, we must determine, pursuant to *Jarrett*, whether Plaintiff-Wife's complaint provided

Defendant-Husband with notice of the nature and basis of the unpleaded allegations of aggressive driving. *Id.*

Plaintiff-Wife's complaint made no mention of Defendant-Husband's driving tendencies, and none of the allegations in the complaint provided Defendant-Husband with notice that his driving would be an issue at the hearing. Accordingly, the trial court erred in admitting this testimony and finding this ground as a basis for its conclusion that Defendant-Husband committed domestic violence.

Having so concluded, we disregard the erroneous finding concerning aggressive driving in conducting the remainder of our review.

B. Findings of Fact

[2] Defendant-Husband next challenges certain findings of fact in the trial court's domestic violence protective orders.

When reviewing a domestic violence protective order, our task is to determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal." *Burress v. Burress*, 195 N.C. App. 447, 449-50, 672 S.E.2d 732, 734 (2009) (citation omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Ward v. Ward*, 252 N.C. App. 253, 256, 797 S.E.2d 525, 528 (quotation marks omitted), *appeal dismissed and disc. review denied*, 369 N.C. 753, 800 S.E.2d 65 (2017). "In a non-jury trial, where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions." *Clark v. Dyer*, 236 N.C. App. 9, 24, 762 S.E.2d 838, 846 (2014), *cert. denied*, 368 N.C. 424, 778 S.E.2d 279 (2015).

Our General Statutes define "domestic violence" as

> the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33.

N.C. Gen. Stat. § 50B-1(a).

Any individual in a qualifying personal relationship who resides in North Carolina may seek relief under Chapter 50B "by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person." *Id.* § 50B-2(a). If the trial court "finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence." *Id.* § 50B-3(a).

1. Unsupported Findings of Fact

Defendant-Husband challenges the evidentiary support for the trial court's finding that "defendant was listening to plaintiff outside her bedroom door, then after plaintiff locked the door, defendant repeatedly pounded on the door and *broke into plaintiff's bedroom*, causing her fear of physical assault[.]" (Emphasis added).

At the hearing, Plaintiff-Wife testified:

> That evening, June 16th, I was in bed texting, looking at things on my phone.
>
> He had chosen to start sleeping out on the couch.
>
> I heard a noise out in the hallway, and I actually came out in the hallway, and [Defendant-Husband] was standing there, and it just gave me that really eerie feeling. He was like spying on me.
>
> So I locked the bedroom door.
>
> He didn't like that, or he wanted to come back in, so he started pounding on the door, and I said, "I don't want you in here."
>
> He got a little key, unlocked the bedroom door, because the previous people that lived there had the little sticks to unlock the door.

> He came in and said he needed to get his phone charger, but I grabbed my purse. I didn't know what he was going to do.
>
> I didn't know if he was going to hit me. I didn't know if he was going to take my purse. I didn't know what to expect.

Plaintiff-Wife's testimony that Defendant-Husband used a key to unlock the bedroom door, after which he retrieved his phone charger and left, does not support the trial court's finding that Defendant-Husband "broke into plaintiff's bedroom." Accordingly, this finding is not supported by competent evidence.

Defendant-Husband further argues that the trial court's finding that he threw keys at Plaintiff-Wife is unsupported by competent evidence. In her complaint, Plaintiff-Wife alleged that on one occasion, Defendant-Husband "[t]hrew the keys down and told [her] to 'F[***]ing put the key on the ring.' " At the hearing, Plaintiff-Wife testified:

> I was packing in the bedroom, and I was about a foot or two away from the bed. He was holding our daughter . . . in his arms, and he came in the bedroom and he took the key and the keyring, and he slammed it on the bed, Your Honor.
>
> Those keys actually slid across the bed.
>
> And he said to me, "Put the key back on the f[***]ing ring," and he had our daughter in his arms, and he went out the bedroom door and slammed it and went outside with her.

Plaintiff-Wife further testified that she was "five feet away" from Defendant-Husband when he threw the keys on the bed. However, the trial court found that "on 6/30/2017, defendant *threw keys at plaintiff* and yelled profanity at her." (Emphasis added). Defendant-Husband challenges this finding, and we agree that it is unsupported by the evidence presented at the hearing. In her complaint and in her testimony, Plaintiff-Wife alleged that Defendant-Husband "threw the keys down" on the bed. No evidence supports the trial court's finding that Defendant-Husband "threw keys at plaintiff."

2. Finding of Demeanor and Past Behavior

Defendant-Husband concedes that competent evidence supports the trial court's finding that "defendant has a 'flashpoint' temper"; however,

Defendant-Husband argues that this finding nevertheless does not support a conclusion that domestic violence occurred. We agree.

"To support entry of a [domestic violence protective order], the trial court must make a conclusion of law 'that an act of domestic violence has occurred.' " *Kennedy v. Morgan*, 221 N.C. App. 219, 223, 726 S.E.2d 193, 196 (2012) (quoting N.C. Gen. Stat. § 50B-3(a)). "Although we appreciate that a 'history of abuse' may at times be quite relevant to the trial court's determination as to whether a recent act constitutes 'domestic violence,' a vague finding of a general 'history of abuse' is not a finding of an 'act of domestic violence' . . . ." *Id.*

Here, Plaintiff-Wife testified several times concerning Defendant-Husband's anger issues. For example, Plaintiff-Wife testified that Defendant-Husband "has always been an angry person[,]" and that after he threw the keys on the bed, "he was the most angry I've ever seen him at that point." Plaintiff-Wife further testified concerning a different incident stating that

> [Defendant-Husband] has been angry, has always been angry. He's always had issues with anger in work, wherever he is.
>
> He's been angry at me plenty of times, . . . and he just became so unpredictable and so angry, I just never knew what he was going to do next.

From this testimony, the trial court found that Defendant-Husband "has a 'flashpoint' temper." This is not a finding of fact that an act of domestic violence, as defined by statute, had occurred, but rather more of a finding concerning Defendant-Husband's demeanor and past behavior. The trial court's finding that Defendant-Husband has a flashpoint temper does not "identify the basis for the act of domestic violence." *Id.* at 224, 726 S.E.2d at 196 (quotation marks omitted) (citing *In re Estate of Mullins*, 182 N.C. App. 667, 671, 643 S.E.2d 599, 602, *disc. review denied*, 361 N.C. 693, 652 S.E.2d 262 (2007) ("The trial court need not recite in its order every evidentiary fact presented at hearing, but only must make specific findings on the ultimate facts that are determinative of the questions raised in the action and essential to support the conclusions of law reached. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense." (citation omitted))). Accordingly, this finding cannot support a conclusion that Defendant-Husband committed an act of domestic violence as defined by N.C. Gen. Stat. § 50B-1.

3. Finding Concerning Fear of Serious Bodily Injury

Defendant-Husband next contends that the trial court's finding that "plaintiff was afraid of defendant and what he might do" does not support the trial court's conclusion that Defendant-Husband placed Plaintiff-Wife in fear of imminent serious bodily injury. We agree.

"The test for whether the aggrieved party has been placed 'in fear of imminent serious bodily injury' is subjective; thus, the trial court must find as fact the aggrieved party 'actually feared' imminent serious bodily injury." *Smith*, 145 N.C. App. at 437, 549 S.E.2d at 914 (citation omitted). In *Smith*, the plaintiff testified that the defendant's actions "made her feel uncomfortable and creepy." *Id.* at 437, 549 S.E.2d at 914-15 (quotation marks omitted). The trial court found that the "[p]laintiff testified [that the] [d]efendant had never physically hurt her, nor was she afraid that he would physically hurt her." *Id.* at 438, 549 S.E.2d at 915. The *Smith* Court held that "[t]hese findings of fact which show [the] [d]efendant's conduct caused [the] [p]laintiff to feel uncomfortable but did not place her in fear of bodily injury do not support a conclusion [that the] [d]efendant placed [the] [p]laintiff in fear of serious imminent bodily injury." *Id.* (quotation marks omitted).

In the instant case, Plaintiff-Wife testified several times that she was "fearful" or "scared" of Defendant-Husband. She testified that she was afraid of his anger, afraid that Defendant-Husband would take the children away, and fearful of what he might "do next." Plaintiff-Wife also testified that after Defendant-Husband used a key to enter the bedroom, "I didn't know if he was going to hit me. I didn't know if he was going to take my purse. I didn't know what to expect."

Plaintiff-Wife further testified about an incident when she found the children's backpacks full of their belongings, and she was concerned that Defendant-Husband was going to leave with the children. When Plaintiff-Wife confronted him, Defendant-Husband cursed at her, slammed the door, and walked away. Plaintiff-Wife testified that

> I didn't know what he was going to do. I didn't know if he was going to go and grab the children and leave or if he was going to harm me, come back in and hit me. I didn't know.
>
> He was very unpredictable. I didn't know what he was going to do.

Additionally, defense counsel asked Plaintiff-Wife whether Defendant-Husband had ever "hurt," "hit," or "harmed" her. Plaintiff-Wife answered that Defendant-Husband "pushed [her] away" on one

occasion; however, when asked again, Plaintiff-Wife stated, "[h]e has not physically hurt me, no. But I didn't know if he could."

Although certainly not an exoneration of Defendant-Husband's behavior, none of the evidence presented to the trial court supports the conclusion that Defendant-Husband's actions subjectively caused Plaintiff-Wife to fear imminent serious bodily injury. Defendant-Husband was unpredictable, and Plaintiff-Wife testified that she was afraid and never knew what he was going to do next. However, regardless of Defendant-Husband's disconcerting behavior, none of his actions amounted to evidence that Defendant-Husband placed Plaintiff-Wife in fear of imminent serious bodily injury. Accordingly, the trial court's findings of fact do not support its conclusion that Defendant-Husband placed Plaintiff-Wife in fear of imminent serious bodily injury.

4. Finding Concerning Substantial Emotional Distress

Finally, Defendant-Husband argues that the trial court's findings of fact fail to support the conclusion that Defendant-Husband placed Plaintiff-Wife in fear of continued harassment inflicting substantial emotional distress. We agree.

As explained above, a trial court can determine that an act of domestic violence occurred when a person in a qualifying relationship with another "[p]lac[es] the aggrieved party . . . in fear of . . . continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress." N.C. Gen. Stat. § 50B-1(a)(2). The domestic violence statute refers to Chapter 14, which defines "harassment" as "[k]nowing conduct, including . . . electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." *Id.* § 14-277.3A(b)(2). Thus, to support a conclusion that harassment rose to the level of domestic violence, the trial court must find that the defendant (1) knowingly committed an act; (2) directed at a person with whom the defendant shared a "personal relationship," as defined by N.C. Gen. Stat. § 50B-1(b); (3) which tormented, terrorized, or terrified the aggrieved party; and (4) served no legitimate purpose. *See id.*; *Kennedy*, 221 N.C. App. at 222, 726 S.E.2d at 195-96. As with fear of imminent serious bodily harm, "[t]he plain language of the statute requires the trial court to apply only a subjective test to determine if the aggrieved party was in actual fear; no inquiry is made as to whether such fear was objectively reasonable under the circumstances." *Wornstaff v. Wornstaff*, 179 N.C. App. 516, 518-19, 634 S.E.2d 567, 569 (2006), *aff'd per curiam*, 361 N.C. 230, 641 S.E.2d 301 (2007).

At the hearing, Plaintiff-Wife testified that Defendant-Husband hacked into her email account, and she presented a screenshot of its security page to support her testimony. Plaintiff-Wife testified that the screenshot "show[ed] what devices [were] signed into [her] email [account]," and that Defendant-Husband's "phone was signed into [her] email account" from Seattle, Washington. Plaintiff-Wife testified that she "noticed that there were some drafts in my Yahoo account with forwarded emails from my email to his email," and that she was "shocked that his phone was signed into [her] personal email."

There is a dearth of case law concerning computer hacking, especially in the domestic violence context; however, in an unpublished opinion from this Court, we considered whether, pursuant to N.C. Gen. Stat. § 50B-1(a)(2), the defendant's hacking of a Facebook account placed the plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress. *See Jackson v. Jackson*, 238 N.C. App. 198, 768 S.E.2d 63 (2014) (unpublished), COA14-440, 2014 N.C. App. LEXIS 1299. We find the analysis in this case to be persuasive.

In *Jackson*, the defendant hacked into the plaintiff's Facebook account and posted videos and messages that the plaintiff characterized as " 'trash' and 'slander.' " *Id.*, 2014 N.C. App. LEXIS 1299, at *5-6. "[B]ecause the video and messages were posted to [the p]laintiff's Facebook account and directly referred to [the p]laintiff," the hacking and posting of messages satisfied the "directed at a person" element of harassment. *Id.* at *17. However, the plaintiff denied that she had suffered "substantial emotional distress" or "sought any counseling" because of the Facebook hacking, and there was no other evidence that she suffered substantial emotional distress. *Id.* at *18. Thus, there was no support for a finding that the hacking caused the plaintiff substantial emotional distress, or constituted an act of domestic violence. *Id.* at *19.

In the instant case, Plaintiff-Wife failed to present evidence that Defendant-Husband's hacking of her email account caused her substantial emotional distress. The trial court stated that the hacking "caused [Plaintiff-Wife] emotional distress." However, while Plaintiff-Wife testified that Defendant-Husband's actions "shocked" her, she did not testify that the hacking caused her emotional distress—substantial or otherwise—or fear of continued harassment. This testimony is insufficient to support a finding that the hacking caused Plaintiff-Wife substantial emotional distress. *See* N.C. Gen. Stat. § 14-277.3A(b)(4) (defining "substantial emotional distress" as "[s]ignificant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling"). Further, no other evidence exists in the record

to support a finding that Defendant-Husband's hacking of Plaintiff-Wife's email account, although clearly reprehensible, caused Plaintiff-Wife to suffer substantial emotional distress. Accordingly, there was no evidence presented to support the trial court's finding that Defendant-Husband caused Plaintiff-Wife to suffer substantial emotional distress by hacking into her email account.

C. Custody

Defendant-Husband last argues that the trial court lacked jurisdiction to enter a temporary custody order regarding the parties' minor children. However, in that the temporary order has expired, this issue is moot.

In its Amended Domestic Violence Order of Protection entered on 12 September 2017, the trial court granted Plaintiff-Wife temporary custody of the minor children. In the order, the trial court recognized that competing custody claims were pending in Wake County and Washington State, and that the parties had scheduled a hearing in Washington for 21 September 2017 to determine jurisdiction. Nevertheless, the trial court determined that it was in the children's best interests to establish a temporary custody and visitation agreement until the custody cases could be heard.

In North Carolina, a temporary custody award entered in a Chapter 50B order cannot last longer than one year. N.C. Gen. Stat. § 50B-3(a1)(4) ("A temporary custody order entered pursuant to this Chapter shall be without prejudice and shall be for a fixed period of time not to exceed one year."). Nor may "a temporary award of custody entered as part of a protective order . . . be renewed to extend a temporary award of custody beyond the maximum one-year period." *Id.* § 50B-3(b).

In the instant case, the trial court's custody order did not have an expiration date or state the fixed period of time for which it was to apply. As a result, the custody order in the instant case necessarily expired no later than 12 September 2018, more than one month before this matter came on for hearing by this Court.

"A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398, 474 S.E.2d 783, 787 (1996) (quotation marks omitted). "[T]he proper procedure for a court to take upon a determination that [an issue] has become moot is dismissal of the action . . . ." *Id.* at 399, 474 S.E.2d at 787. Accordingly, we dismiss as moot Defendant-Husband's appeal from the expired temporary custody order.

III. Conclusion

The trial court erred by admitting testimony in support of unpleaded allegations of domestic violence, and the trial court's findings of fact fail to support a conclusion that an act of domestic violence occurred. Accordingly, we reverse the domestic violence protective orders entered against Defendant-Husband. Further, we dismiss as moot Defendant-Husband's appeal from the expired temporary custody order.

REVERSED IN PART; DISMISSED IN PART.

Chief Judge McGEE and Judge TYSON concur.

OSI RESTAURANT PARTNERS, LLC f/k/a OSI RESTAURANT PARTNERS, INC. and OUTBACK STEAKHOUSE, INC.; BONEFISH GRILL, LLC f/k/a BONEFISH GRILL, INC.; CARRABBA'S ITALIAN GRILL, LLC f/k/a CARRABBA'S ITALIAN GRILL, INC.; CHEESEBURGER IN PARADISE, LLC; OS SOUTHERN, LLC f/k/a OS SOUTHERN, INC.; OSI/FLEMING'S, LLC f/k/a OUTBACK/FLEMING'S, LLC; and OUTBACK STEAKHOUSE OF FLORIDA, LLC f/k/a OUTBACK STEAKHOUSE OF FLORIDA, INC., Plaintiffs

v.

OSCODA PLASTICS, INC. and ALLIED COMPANIES, LLC f/k/a THE ALLIED COMPANIES INTERNATIONAL, LLC and its successors in interest and/or related entities ALLIED INDUSTRIES INTERNATIONAL, INC.; ALLIED FLOORING PRODUCTS, INC.; ECO-GRIP CENTRAL, LLC; ECO-GRIP EAST, LLC; ECO-GRIP FLOORING, LLC; ECO-GRIP FLOORING GULF COAST, LLC; and ECO-GRIP GREAT LAKES, LLC, Defendants

No. COA18-841

Filed 16 July 2019

Discovery—sanctions—in addition to prior ordered sanction—lack of notice—due process violation

In the discovery phase of a lawsuit between a group of restaurants and a commercial flooring manufacturer, where the trial court sanctioned the manufacturer with a spoliation instruction and later held a hearing on the manufacturer's motion to set aside the instruction, the trial court violated the manufacturer's due process rights by imposing additional sanctions pursuant to Rule of Civil Procedure 37(b) at that hearing, per the restaurants' request. The restaurants did not file a motion seeking sanctions against the manufacturer under Rule 37 before the hearing, so the manufacturer lacked prior notice that such sanctions would be considered and on what alleged grounds those sanctions might be imposed.

Appeal by defendant Oscoda Plastics, Inc. from order entered 10 April 2018 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 27 March 2019.

Young Moore and Henderson, P.A., by Christopher A. Page and Jonathan L. Crook, for plaintiffs-appellees.

Parker Poe Adams & Bernstein LLP, by Kevin L. Chignell and Collier R. Marsh, for defendant-appellant Oscoda Plastics, Inc.

ZACHARY, Judge.

Defendant Oscoda Plastics, Inc.[1] appeals from the portion of the trial court's order imposing discovery sanctions in the form of striking its answer to Plaintiffs' claims for negligence, breach of implied warranty, and breach of express warranty. Because Defendant was not given notice that sanctions might be imposed, we reverse that portion of the trial court's order.

Background

Plaintiffs are several restaurants operated under the parent company OSI Restaurant Partners, LLC (collectively, "Plaintiffs"). Defendant is a manufacturer of commercial flooring products, which Plaintiffs purchased and installed in 130 of their restaurants across the United States. Plaintiffs initiated the instant action against Defendant on 5 July 2013, alleging that the flooring they purchased from Defendant had "completely failed at numerous restaurants, requiring complete replacement of the flooring products at numerous of the Plaintiffs' locations," as well as "costly repairs." Specifically, Plaintiffs alleged that the problems included "seam separation, seam distortion, bubbling under the flooring, flooring detachment from the substrate, and water ponding beneath the flooring." In their complaint, Plaintiffs asserted claims for negligence, breach of implied warranty, breach of express warranty, strict liability, negligent misrepresentation, and breach of consumer protection acts.

Through discovery, Plaintiffs sought to learn the extent of Defendant's knowledge of the alleged defects in its flooring. Plaintiffs requested that Defendant produce, *inter alia*, all documents that referred or related to (1) "the design, testing, or manufacture of" its flooring, (2) "any issues with or complaints about" the flooring, and (3) "any attempt to repair or otherwise correct the issues with or complaints about" the flooring.

1. The other defendants are not party to the instant appeal.

Following Plaintiffs' first motion to compel, Defendant indicated that it had certain "backup tapes" that might potentially contain responsive emails and documents.

On 4 September 2015, the trial court ordered Defendant to produce "all responsive, non-privileged documents contained on the backup tapes for the time period from 2006 through 2009." On 9 October 2015, Defendant filed a motion for reconsideration, contending that it had "obtained new information . . . that indicates that recovery of the backup tapes will be far more expensive and time consuming . . . than [Defendant] initially expected." However, after two orders extending Defendant's deadline to produce the backup tapes, Defendant returned to court, this time representing that it was unable to access the documents due to the fact that the backup tapes were encrypted.

On 16 March 2016, the trial court entered an order (the "Spoliation Order"), concluding that Defendant had "intentionally encrypted emails and . . . intentionally failed to retain the electronic ability to retrieve the subject emails, with knowledge of their relevance and materiality for this case," and that Defendant had "suppressed its knowledge of this encryption for several months prior to it being revealed for the first time by forensic experts." The trial court ordered that Defendant be sanctioned with a "spoliation instruction to the jury unless, not less than 120 days prior to the trial, [Defendant] provide[d] Plaintiffs the subject emails in an unencrypted form."

Shortly thereafter, Defendant represented that it had discovered a means by which it could gain access to the documents on its backup tapes, and on 14 October 2016, Defendant produced more than 5,000 pages of those documents. When Plaintiffs reviewed the documents, they discovered a potential reference to the existence of flooring testing data. Plaintiffs requested that Defendant further supplement its document production to include those related materials, and after Plaintiffs filed a second motion to compel, Defendant produced additional documents. Defendant also indicated that it did not possess any additional responsive documents requested by Plaintiffs, but that such documents were in the possession of its sister company, Duro-Last. The trial court thus ordered Defendant to "use reasonable efforts to encourage the voluntary production of the Duro-Last Documents by Duro-Last."

Duro-Last produced 1,054 pages of documents on 13 July 2017. At that point, Defendant maintained that the terms of the Spoliation Order had been "fully satisfied," and on 13 November 2017, Defendant filed a motion to set aside the spoliation instruction.

According to Plaintiffs, however, the documents that they received from Duro-Last contained several highly relevant emails that would have been stored on Defendant's backup tapes, but nevertheless were not included within the 5,000 pages of documents that Defendant produced from the tapes. In particular, Plaintiffs emphasized an email sent from Defendant's technical sales manager to a Duro-Last representative, in which the manager stated, "we have been doing some testing on our vinyl flooring . . . . The biggest problem we have with material in the field is shrinking." According to Plaintiffs, this "smoking gun" email

> was on the backup tapes, it is not privileged, it is relevant, it contains search terms [Defendant] apparently applied in [its] review, and *it was sent from the only employee who supplied information for [Defendant's] responses to Plaintiffs' first set of interrogatories, in which [Defendant] flatly denied any defects with its product.*

Plaintiffs subsequently filed a motion to amend their complaint in order to allege "newly discovered facts related to [Defendant's] knowledge of defects in the [flooring] and [Defendant's] contemporaneous misrepresentations and fraudulent concealment of the same," and to "assert claims for fraudulent concealment and punitive damages against [Defendant] based on th[is] newly discovered evidence." Defendant consented to Plaintiffs' motion to amend their complaint.

On 14 December 2017, Defendant's motion to set aside the spoliation instruction came on for hearing before the Honorable Robert H. Hobgood. Plaintiffs argued that the spoliation instruction was justified based upon Defendant's conduct throughout discovery. Furthermore, pointing to the newly discovered "smoking gun" emails, Plaintiffs argued that the Spoliation Order "not only shouldn't be lifted, [but] it should be modified to make it more severe." Plaintiffs suggested that the trial court order Defendant to produce *all* of its remaining backup tapes within 30 days, and if Defendant did not comply, Plaintiffs asked that the court "consider the sanction of a default judgment against [Defendant], and we will try the case on damages."

Apparently surprised by Plaintiffs' stance, Defendant noted that Plaintiffs' argument was "not a response to our argument" regarding the spoliation instruction, but was instead "related to [the allegations in their] motion to amend." Defendant maintained that it had consented to Plaintiffs' motion to amend "because we understood that today was not the time to argue that." Defendant also pointed out that there was not a pending motion to compel, but nevertheless attempted to defend against Plaintiffs' suggestion that additional sanctions were warranted.

On 10 April 2018, the trial court denied Defendant's motion to set aside the spoliation instruction due to Defendant's failure to comply with the Spoliation Order. Specifically, the trial court found that Defendant "ha[d] not satisfied the requirement . . . that it produce to Plaintiffs the subject emails from 2006 to 2009 on the backup tapes." In addition, the trial court found that Defendant's

> repeated sworn representations in its pleadings and interrogatory responses that it never believed [its flooring] product to be defective in any way have been shown to be false or misleading by the documents Duro-Last produced from the backup tapes. The Court finds it significant that perhaps the most critical email Duro-Last produced was sent by [Defendant's technical sales manager], who was also the only witness [Defendant] identified as providing responses to Plaintiffs' interrogatories, in which [Defendant] flatly denied there being any defect in [its flooring] at any time.

Based upon its findings of misrepresentations and "other acts of misconduct," the trial court concluded that it would "impose additional sanctions against [Defendant] pursuant to North Carolina Rules of Civil Procedure 37(b)(2) and its inherent powers." The trial court sanctioned Defendant by striking its answer and entering default against it as to liability on Plaintiffs' claims for negligence, breach of implied warranty, and breach of express warranty. Defendant timely filed written notice of appeal.

On appeal, Defendant argues that the trial court's order striking its answer as a discovery sanction violated Defendant's due process rights, in that Defendant "was not provided notice in advance of the 14 December 2017 hearing that sanctions would be considered." In the alternative, Defendant contends that the trial court abused its discretion because (1) no discovery violation occurred, and (2) the order was manifestly unsupported by reason.

Grounds for Appellate Review

Although the trial court's order is interlocutory, Defendant maintains that it has the right to an immediate appeal because the order affects a substantial right, in that it sanctions Defendant in the form of striking its answer. Indeed, "[o]rders of this type have been described as affecting a substantial right," and are therefore immediately appealable. *Essex Grp. Inc. v. Express Wire Servs.*, 157 N.C. App. 360, 362, 578 S.E.2d 705, 707 (2003).

Discussion

Defendant first argues that the trial court violated its due process rights by ordering discovery sanctions and striking Defendant's answer, because Defendant received "no notice that the trial court was considering sanctions and no notice of the basis for the sanctions imposed." We agree.

Rule 37 of the North Carolina Rules of Civil Procedure allows a trial court to sanction a party for discovery violations. *See* N.C. Gen. Stat. § 1A-1, Rule 37(b) (2017). However, "[n]otice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution," and these protections apply with equal force to a trial court's authority to impose sanctions under Rule 37. *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 438 (1998).

In order for a trial court to impose sanctions against a party, the Due Process Clause requires that the party was first afforded the "right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions." *Megremis v. Megremis*, 179 N.C. App. 174, 179, 633 S.E.2d 117, 121 (2006). A party is entitled to notice whether sanctions are imposed under Rule 37, *id.* at 178-79, 633 S.E.2d at 121, or under the trial court's inherent disciplinary authority, *Williams v. Hinton*, 127 N.C. App. 421, 426, 490 S.E.2d 239, 242 (1997) ("[T]he trial courts have ample power to control the conduct of attorneys through either the inherent power to discipline attorneys or by the use of contempt powers, or both, after proper notice and opportunity to be heard."). Clearly, "the complete absence of notice of potential sanctions . . . is not adequate notice." *Green v. Green*, 236 N.C. App. 526, 540, 763 S.E.2d 540, 550 (2014). "Our Court has held that a party sanctioned under Rule 37 ha[s] [constitutionally adequate] notice of sanctions where the moving party's written discovery motion clearly indicate[s] the party [is] seeking sanctions under Rule 37." *Megremis*, 179 N.C. App. at 179, 633 S.E.2d at 121.

In the instant case, Plaintiffs did not file a written motion seeking discovery sanctions against Defendant. At the time of the 14 December 2017 hearing, the only motions pending were (1) Defendant's motion to set aside the spoliation instruction, and (2) Plaintiffs' motion to amend their complaint. Because Defendant had already consented to Plaintiffs' motion to amend the complaint, the only matter left to be resolved at the hearing was Defendant's motion to set aside the spoliation instruction.

After Defendant presented its argument as to why it should be relieved of the spoliation instruction, Plaintiffs responded that Defendant's

conduct "so far justifies [the] spoliation order for trial in this case." However, drawing upon largely the same grounds alleged in their motion to amend, Plaintiffs further argued that the Spoliation Order should "be modified to make it more severe." Defendant protested, noting that Plaintiffs' argument was not responsive to Defendant's, and explaining that "we understood that today was not the time to argue that." Nevertheless, Defendant attempted to respond to Plaintiffs' contention that the allegations set forth in their motion to amend justified subjecting Defendant to further sanctions.

On appeal, Plaintiffs contend that the trial court's decision to impose additional sanctions following the 14 December 2017 hearing did not violate Defendant's due process rights, because the allegations in their motion to amend sufficiently "laid out the factual basis for additional sanctions." In other words, because Defendant had been served with Plaintiffs' motion to amend, and because the allegations therein could also serve as the "factual basis for additional sanctions," Defendant was provided sufficient notice of both (1) the fact that sanctions might be imposed, and (2) the grounds for such sanctions. Plaintiffs' argument is misplaced.

Our case law makes clear that parties have a due process right not only to notice of "the alleged grounds for the imposition of sanctions," but also "of the fact that sanctions may be imposed." *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 609, 596 S.E.2d 285, 290 (2004), *disc. review denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). In the instant case, however, Plaintiffs "filed no written motion seeking sanctions," *Green*, 236 N.C. App. at 540, 763 S.E.2d at 549, nor was there a pending motion to compel at the time of the 14 December 2017 hearing. While Plaintiffs' motion to amend the complaint contained allegations which, if true, might support the imposition of additional sanctions against Defendant, wholly absent from Plaintiffs' motion was any indication that those allegations were intended to serve as the basis for additional sanctions. *Cf. N.C. State Bar v. Barrett*, 219 N.C. App. 481, 488, 724 S.E.2d 126, 131 (2012) ("The allegations in the complaint did not . . . clearly apprise Defendant of the conduct which she would have to defend at the hearing." (quotation marks omitted)).

Moreover, the fact that Defendant attempted to defend against Plaintiffs' request for additional sanctions at the hearing is not evidence that Defendant did, in fact, receive proper notice. *See Zaliagiris*, 164 N.C. App. at 609, 596 S.E.2d at 290 ("The fact that the party against whom sanctions are imposed took part in the hearing and did the best [it] could do without knowing in advance the sanctions which might be imposed does not show a proper notice was given." (quotation marks

omitted)). Because the issue of sanctions was only "initially addressed at the hearing," it cannot be said that Defendant received proper notice and an opportunity to be heard, so as to render the trial court's order compliant with the demands of due process. *Green*, 236 N.C. App. at 540, 763 S.E.2d at 549.

The trial court exhibited abundant patience in this matter. Patience runs thin when a party repeatedly delays compliance with discovery requests and court orders. However, because Defendant received no notice whatsoever that it might be subject to sanctions based upon the facts alleged in Plaintiffs' motion to amend prior to the 14 December 2017 hearing, we must reverse the trial court's order. *See Megremis*, 179 N.C. App. at 181, 633 S.E.2d at 122 ("[D]efendant in the present case did not have notice *in advance* of the trial that sanctions might be imposed against her. Consequently, we conclude the trial court violated defendant's due process right to proper notice." (citation omitted)); *see also Green*, 236 N.C. App. at 540, 763 S.E.2d at 550 ("We can safely say that the complete absence of notice of potential sanctions . . . is not adequate notice.").

Finally, we note that Defendant's due process argument is properly presented for appellate review. Defendant was not deprived of its due process rights until the point at which the trial court *entered* its order imposing additional unnoticed sanctions, the order from which Defendant appeals. Nor did Defendant waive its right to due process at the 14 December 2017 hearing, as Plaintiffs contend. "[W]aiver of the right to due process must be made voluntarily, knowingly, and intelligently." *Barrett*, 219 N.C. App. at 488, 724 S.E.2d at 131. At the hearing, Plaintiffs requested that the Spoliation Order "be modified to make [the sanction] more severe" and proceeded to outline the grounds supporting such action. Defendant, seemingly blindsided, protested that "we understood that today was not the time to argue that," and continued to assert the same throughout the remainder of the hearing. Defendant's statements demonstrate that it had not anticipated that it would be required to expand the scope of its argument beyond the spoliation instruction to include defenses to the imposition of additional sanctions. *See id.* ("Defendant stated during the hearing that 'my understanding is that the misrepresentation alleged in the complaint was the only issue that required me to formulate a defense for today.' This statement indicates Defendant believed she was facing only the allegation in the complaint and was not prepared to defend any others; it does not suggest that she was voluntarily, knowingly, and intelligently waiving her right to due process."). Accordingly, Defendant did not waive its right to due process,

and appropriately asserts the same in support of its contention that the trial court's order imposing additional sanctions must be reversed.

Conclusion

For the reasoning discussed herein, we reverse that portion of the trial court's order sanctioning Defendant by striking its answer to Plaintiffs' claims for negligence, breach of implied warranty, and breach of express warranty. Having so concluded, we need not address Defendant's remaining challenges to the trial court's order.

REVERSED IN PART.

Judges STROUD and INMAN concur.

MATTHEW JASON ROYBAL, PLAINTIFF
v.
CHRISTY ANNE RAULLI, DEFENDANT

No. COA18-1085

Filed 16 July 2019

1. Appeal and Error—interlocutory appeal—Uniform Deployed Parents Custody and Visitation Act—custodial responsibility order

In a case of first impression, the Court of Appeals had jurisdiction under N.C.G.S. § 50-19.1 to immediately review an appeal from a custodial responsibility order entered pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) because, although the order was technically temporary, it constituted a final order (as to custody issues raised under the UDPCVA) within the meaning of Civil Procedure Rule 54(b) but for the other pending claims.

2. Parties—Uniform Deployed Parents Custody and Visitation Act—custodial responsibility order—non-parent—necessary party

In a custody action between parents of two minor children, a custodial responsibility order entered under the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) was remanded so that the children's stepmother—to whom the trial court granted "limited contact" with the parties' daughter—could be made a party to the action, as required under the UDPCVA (N.C.G.S. § 50A-375(b)).

Because the trial court treated the stepmother as a "de facto" party, its failure to formally add the stepmother as a party did not impair the Court of Appeals' jurisdiction to review the case.

3. Child Custody and Support—Uniform Deployed Parents Custody and Visitation Act—claim for custodial responsibility—prior judicial order—no modification

In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), a prior custody order regarding the parties' daughter constituted a "prior judicial order designating custodial responsibility of a child in the event of deployment" (N.C.G.S. § 50A-373). Further, where the UDPCVA's standard for modifying prior custody orders was less stringent than the standard for modifying custody orders under Chapter 50 of the General Statutes, the trial court did not abuse its discretion by determining that the "circumstances required" no change to the prior order's provisions addressing caretaking or decision-making authority over the daughter.

4. Child Custody and Support—Uniform Deployed Parents Custody and Visitation Act—caretaking authority—non-parent—denied

In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court did not abuse its discretion by denying caretaking authority—one type of custodial responsibility under the UDPCVA—to the stepmother over the parties' daughter. The court entered findings of fact showing that it carefully considered the entire family's situation, as well as the daughter's needs, when reaching its determination.

5. Child Custody and Support—Uniform Deployed Parents Custody and Visitation Act—decision-making authority—non-parent—denied

In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court did not abuse its

discretion by denying decision-making authority—one type of "custodial responsibility" under the UDPCVA—to the stepmother over the parties' daughter. The UDPCVA allowed the court to grant decision-making authority "if the deploying parent is unable to exercise that authority" (N.C.G.S. § 50A-374), but the father failed to present any evidence that he would be unable to communicate with the mother—and thereby exercise decision-making authority over his daughter—during his deployment.

6. Child Custody and Support—Uniform Deployed Parents Custody and Visitation Act—limited contact—non-parent—denied

In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court did not abuse its discretion by granting the stepmother "limited contact" with the parties' daughter on a shorter schedule than what the father was granted under a prior custody order. The prior order did not address granting limited contact to a non-parent with the daughter, so the trial court was not bound by that order when determining the amount of limited contact to grant the stepmother.

7. Child Custody and Support—Uniform Deployed Parents Custody and Visitation Act—custodial responsibility—prior judicial order—temporary custody order—no modification

In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court properly treated a temporary custody order it had previously entered as to the parties' son as a "prior judicial order designating custodial responsibility of a child in the event of deployment" (N.C.G.S. § 50A-373), because the term "prior judicial order" included temporary orders. Further, under the UDPCVA's lenient standard for modifying prior custody orders, the trial court did not abuse its discretion by determining that the "circumstances required" no change to the prior order's provisions addressing caretaking or decision-making authority over the parties' son.

8. Child Custody and Support—Uniform Deployed Parents Custody and Visitation Act—limited contact—non-parent—denied

In a custody action between parents of two children, where the father, who was serving in the military, filed a motion asking the trial court to grant custodial responsibility of the children to their stepmother pursuant to the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), the trial court's order denying the stepmother "limited contact" with the parties' son was remanded because the trial court based its decision on a flawed interpretation of the UDPCVA and of a custody order previously entered in the case. Furthermore, the evidence showed that the son had a "close and substantial relationship" with his stepmother, and nothing in the trial court's order suggested that granting her limited contact would be contrary to the son's best interests (N.C.G.S. § 50A-375).

9. Appeal and Error—abandonment of issues—no objection at trial court hearing

In an appeal from a custodial responsibility order entered pursuant to the Uniform Deployed Parents Custody and Visitation Act, where the appellant father challenged the time limits the trial court imposed on the parties' presentation of evidence and arguments at a related hearing, the father's argument was deemed abandoned because he did not object to the time limitations or request additional time during the hearing.

Appeal by plaintiff from order entered 8 October 2018 by Judge Samantha Cabe in District Court, Orange County. Heard in the Court of Appeals 8 May 2019.

Browner Law, PLLC, by Jeremy Todd Browner, for plaintiff-appellant.

Ellis Family Law, P.L.L.C., by Autumn D. Osbourne, for defendant-appellee.

STROUD, Judge.

Matthew Roybal appeals from an order addressing several issues of first impression for this Court arising from the Uniform Deployed Parents Custody and Visitation Act ("UDPCVA"). N.C. Gen. Stat. §§ 50A-350-396 (2017). Father's motion and the trial court's order dealt with all three aspects of custodial responsibility recognized by the UDPCVA: caretaking authority, decision-making authority, and limited contact. N.C. Gen. Stat. §§ 50A-374-375. The applicable standards for each aspect of custodial responsibility are slightly different, and here,

separate prior orders addressed custody for each of the parties' two children, Elizabeth and Jay.[1] Because both children's previous custody orders addressed caretaking authority and decision-making authority in the event of Father's deployment, and the trial court did not find that the circumstances required modification, the trial court did not abuse its discretion in denying Father's motion as to these two aspects of custodial responsibility. But the prior orders did not address "limited contact," which is a form of visitation specifically authorized under the UDPCVA. N.C. Gen Stat. § 50A-375. The statute requires limited contact to be granted to a "nonparent" with a "close and substantial relationship" with a child unless limited contact is contrary to the child's best interest. *Id.* The trial court correctly granted limited contact to Father's wife, Stepmother, as to Elizabeth, but erred in its interpretation of Jay's prior order and North Carolina General Statute § 50A-373(1) as preventing the court from granting limited contact as to Jay. We therefore affirm the trial's court order in part but remand for the trial court to grant limited contact with Jay to Stepmother unless the court determines that she does not have a "close and substantial relationship" with Jay or that limited contact would be contrary to his best interests. *Id.* We also remand for the trial court to recognize Stepmother as a party to this action "until the grant of limited contact is terminated." N.C. Gen. Stat. § 50A-375(b).

I. Background

Mother and Father (hereinafter "parents") never married but while they were residing together, Elizabeth was born in 2012, and after their relationship ended, Jay was born in 2016. In September of 2014, Plaintiff-Father filed a verified complaint against Defendant-Mother for joint and legal custody of their daughter, Elizabeth. On 21 November 2014, Mother answered Father's verified complaint and requested custody and child support.

On 29 June 2016, the trial court entered into a consent order for joint legal and physical custody of Elizabeth ("Elizabeth's Consent Order"). When Elizabeth's Consent Order was entered, Father was residing with his then fiancé, Victoria, ("Stepmother") and her daughter, age seven, from a previous relationship. Elizabeth had already been "introduced as a member of [Father's] household,"[2] and Mother was seven months

1. Pseudonyms will be used for the privacy of the minors involved.

2. The parents developed the terms of Elizabeth's Consent Order in mediation and it includes "limited findings of fact" by consent. The facts regarding circumstances at the time of entry of Elizabeth's Consent Order come from findings of fact in the 2016 order regarding Jay's custody.

pregnant with Jay. Elizabeth's order has extensive and detailed provisions for shared custody and decision-making and has these provisions relevant to this case:

> 2. Time-Sharing (Physical Custody). The parties shall share the physical custody of the minor child as set forth herein.
>
> (a) Regular Weekly Schedule: Except for the periods of Vacation, Holidays and the Plaintiff's Military Duty as set forth below and except for what may otherwise be mutually agreed upon between the parties the minor child shall be in the physical custody of the Plaintiff beginning at 9:30 AM on Sunday morning and continuing until the beginning of school on Tuesday morning [two (2) days later] or until 9:30 AM on Tuesday morning if there is no school. The minor child shall be in the physical custody of the Defendant beginning with her drop off at school on Tuesday morning or from 9:30 AM on Tuesday if there is no school until she is dropped off for the beginning of school on Thursday morning [two (2) days later] or until 9:30 AM on Thursday morning if there is no school. The minor child shall be in the Plaintiff's physical custody from the time she is dropped off for school on Thursday morning or from 9:30 AM on Thursday morning if there is no school until the time she is dropped off for school on Friday or until 9:30 AM on Friday if there is no school. The minor child shall be in the Defendant's physical custody from Friday at the beginning of school or from 9:30 AM on Friday if there is no school until Sunday morning at 9:30 AM. The net result of this schedule is that the Plaintiff has physical custody of the minor child for three (3) overnights (Sunday, Monday and Thursday) and the Defendant has physical custody of the minor child for four (4) overnights (Tuesday, Wednesday, Friday and Saturday) with the minor child each week, sharing her on a 2-2-1-2 schedule.
>
> (i) Military Duty: In the event that the Plaintiff has an USAR Drill Weekend (also known as a "Battle Assembly"), he shall pick up the minor child by 6:00 PM on Sunday to begin his physical custodial time. If the Plaintiff is unable to pick up the child by 6:00 PM, the Defendant shall retain physical custody of the child until the beginning of school

on Monday morning or until 9:30 AM on Monday morning if there is no school, or as may be otherwise mutually agreed to between the parties.

. . . .

5. "Temporary Military Duty" or "Active Duty". To the extent that any Temporary Military Duty would impact the Regular Weekly Schedule set forth above, the parties shall return to mediation to determine a new schedule, as appropriate at that time. Likewise, in the event that the parties cannot create a mutually agreeable schedule during any periods of Active Duty, the parties shall return to mediation for assistance in reaching a new schedule. Until such time as a new Order or agreement is in place, the minor child shall remain in Defendant's care if the Plaintiff is unavailable to exercise his time with the minor child.

6. Legal Custody. The parties shall share jointly in the decisions in reference to the major areas of parenting, as often as possible, and specifically:

. . . .

(xi) The parties further stipulate and agree that should Plaintiff be deployed or otherwise unavailable due to his military status and therefore he be [sic] unable to respond to Defendant surrounding a matter that would generally fall under legal custody as described herein, Defendant shall be entitled to solely make said decision after waiting forty eight (48) hours to hear back from Plaintiff short of an emergency.

After the entry of Elizabeth's Consent Order, Jay was born in August 2016. In September 2016, Father filed a motion to modify custody seeking modification of Elizabeth's Consent Order and determination of Jay's custody. On 11 July 2017, the trial court entered an order regarding Jay's custody, granting the parents joint legal and physical custody on a temporary basis, with a final order to be determined later.[3] The trial court denied Father's motion to modify Elizabeth's Consent Order,

3. The order provides that a hearing on permanent custody for Jay "shall not be scheduled before December 2017." Jay's order does not appear to be a consent order, but prior to the Conclusions of Law, the order states: "Based upon the consent of the parties and the foregoing Limited Findings of Fact, the Court makes the following: CONCLUSIONS OF LAW."

finding no substantial change of circumstances since entry of the order. When Jay's order was entered, Father had married Stepmother, and she was pregnant. Jay was eight months old at the time of the hearing in April 2017; he was still breastfeeding and not yet sleeping through the night. The trial court granted joint legal and physical custody of Jay to the parents and set forth a detailed schedule for physical custody and provisions regarding decision-making. As relevant to the issues in this case, the order includes these provisions regarding military service:

> g. Should Plaintiff be unable to exercise his custodial time described herein due to travel for work or any form of military duty, including but not limited to: temporary military duty, active duty or deployment, the minor child shall remain in Defendant's custody.
>
> h. The parties shall share jointly in the decisions in reference to the major areas of parenting, as often as possible, and specifically:
>
> i. The parties each have the right to make the day-to-day decisions for the minor child. In matters of more consequence with long-lasting significance, these issues will be discussed between the parties in an effort to resolve them by mutual agreement. In the event the parties cannot agree, they shall seek assistance from a relevant professional or return to mediation.
>
> ii. The parties shall each provide one another with a current address, email address and telephone number and shall provide notice of any change in this information at least 48 hours prior to such change.

On 21 May 2018, Father notified Mother via email of his upcoming deployment. Mother and Father discussed attending mediation but could not schedule mediation in time to resolve their custody issues before Father's departure. Father's official orders to report for "active duty as a member of your Reserve Component Unit" of the United States Army were issued on 2 August 2018.[4] He was required to report first to Fort Hood, Texas, on 20 August 2018 for mandatory training prior to deployment, and his mobilization would begin 27 August 2018 and last

4. The United States Army Reserves is included in the definition of "Uniformed service." N.C. Gen. Stat. § 50A-351(18).

400 days. The purpose of his activation was "in support of OPERATION ENDURING FREEDOM-HORN OF AFRICA." The Orders did not allow dependents to accompany Father.

On 13 August 2018, Father filed a "Motion to Grant Caretaking Authority to Nonparent Due to Deployed Parent" under the UPDCVA with the Orange County District Court. He alleged Stepmother and the children's stepsister and half brother have close and substantial relationships with Elizabeth and Jay and that Stepmother should be granted "caretaking and decision-making authority, or in the alternative, limited contact" with both children.

Despite Father's deployment date of 20 August 2018, the trial court set the hearing for 22 October 2018. Father filed a petition for a writ of mandamus with this Court to order the trial court to expedite the hearing as required under North Carolina General Statute § 50A-371.[5] On 24 September 2018, this Court granted Father's petition and ordered the trial court to hold a hearing by 8 October 2018. On 28 September 2018, the trial court held a hearing on Father's motion and entered an order on 8 October 2018 denying the motion as to Jay and granting it in part by ordering limited contact only for Elizabeth. Father timely appealed.

II. Interlocutory Appeal

[1] The order on appeal is an interlocutory order, since it does not resolve all pending claims and is a temporary order. An order issued under the UDPCVA is by definition a "temporary order" and terminates "60 days from the date the deploying parent gives notice of having returned from deployment to the other parent" or "death of the deploying parent":

> A temporary order for custodial responsibility issued under Part 3 of this Article shall terminate, if no agreement between the parties to terminate a temporary order for custodial responsibility has been filed, 60 days from the date the deploying parent gives notice of having returned from deployment to the other parent and any nonparent granted custodial responsibility, when applicable, or upon the death of the deploying parent, whichever occurs first.

5. The UDPCVA requires the trial court to conduct an expedited hearing. N.C. Gen. Stat. § 50A-371. We understand that the trial court's docket is normally set far in advance and is more than full, but because military deployments often require parents to report for duty very soon, the statute requires this type of hearing to be given priority.

N.C. Gen. Stat. § 50A-388(a). "The general rule which has been stated by this Court is that temporary custody orders are interlocutory and unless the order affects a "substantial right of [the appellant] which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits[,]" the appeal must be dismissed. *File v. File*, 195 N.C. App. 562, 569, 673 S.E.2d 405, 410 (2009) But all prior cases addressing appeals of temporary custody orders dealt with orders entered under Chapter 50, and in those cases, a permanent order will normally be entered in the near future. *See Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003). ("[A]n order is temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues."). Our Court has not previously addressed jurisdiction to review a custodial responsibility order issued under the UDPCVA.[6]

Father contends this order falls under North Carolina General Statute § 50-19.1, which allows immediate appeal of custody orders even if other claims remain pending in the same action:

> Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.

N.C. Gen. Stat. § 50-19.1 (2017).

We agree that a custodial responsibility order under the UDPCVA is a variety of "child custody" order covered by North Carolina General Statute § 50-19.1. Although Jay's Custody order was a temporary order and issues regarding his permanent custody remain unresolved, the issues regarding his permanent custody under Chapter 50 are independent of Father's claim under the UDPCVA. The order on appeal is technically a "temporary" order, since custodial responsibility orders under

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6. "Custodial responsibility" is "[a] comprehensive term that includes any and all powers and duties relating to caretaking authority and decision-making authority for a child. The term includes custody, physical custody, legal custody, parenting time, right to access, visitation, and the authority to designate limited contact with a child." N.C. Gen. Stat. § 50A-351(6).

the UDPCVA are *required* to be temporary orders unless the parties agree to entry of a permanent order.[7] *See* N.C. Gen. Stat. §§ 50A-385-388. But orders for custodial responsibility under the UDPCVA would be essentially non-appealable if we treated them like temporary custody orders under Chapter 50. The order on appeal is a final order addressing all issues raised under the UDPCVA and those issues are independent of the underlying Chapter 50 custody claims, so it is otherwise "a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action." N.C. Gen. Stat. § 50-19.1. In addition, as a practical matter, since a hearing regarding Jay's pending permanent custody could not be done while Father is deployed, if Father were required to wait for resolution of Jay's permanent custody before appealing the custodial responsibility order, the UDPCVA order would be rendered moot. Because the order under the UDPCVA is a final order addressing the UDPCVA claim, we have jurisdiction to review the order under North Carolina General Statute § 50-19.1.

III. Parties

[2] We first note that Stepmother has not formally intervened or been made a party to this case.[8] Either parent may file a claim or motion under the UDPCVA. The UDPCVA addresses how and when a "proceeding for a temporary custody order" may be filed. N.C. Gen. Stat. § 50A-370(b) ("At any time after a deploying parent receives notice of deployment, either parent may file a motion regarding custodial responsibility of a child during deployment."). This portion of the statute does not address intervention or adding parties to the case. Later in Article 3, North Carolina General Statute § 50A-375, entitled "Grant of Limited Contact," deals with provisions of the order and provides that "[a]ny nonparent who is granted limited contact *shall* be made a party to the action until the grant of limited contact is terminated." N.C. Gen. Stat. § 50A-375(b) (emphasis added). "Limited contact" is defined as "[t]he opportunity for a nonparent to visit with a child for a limited period of time. The term

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7. "After a deploying parent receives notice of deployment and during the deployment, a court may issue a temporary order granting custodial responsibility unless prohibited by the Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 521-522. A court may not issue a permanent order granting custodial responsibility in the absence of the deploying parent without the consent of the deploying parent." N.C. Gen. Stat. § 50A-370(a).

8. Elizabeth's Consent Order includes a provision regarding intervention by "Defendant's mother, Diane Ivers Raulli" who "filed a Motion to Intervene in this case on June 28, 2016." The parties stipulated Defendant's mother was allowed to intervene and a consent order was to be prepared granting intervention, reserving her request for grandparent visitation rights. Our record does not reveal if the order for intervention was ever entered or if Grandmother's request for visitation was ever considered.

includes authority to take the child to a place other than the residence of the child." N.C. Gen. Stat. § 50A-351(11).

The order on appeal granted Stepmother, a "nonparent" as defined by North Carolina General Statute § 50A-351(11), "limited contact" with Elizabeth, so she should have been made a party to this action "until the grant of limited contact is terminated." N.C. Gen. Stat. § 50A-375(b). We must therefore consider whether we have jurisdiction to consider the issues on appeal, since all "necessary parties" must be joined in an action under North Carolina General Statute § 1A-1, Rule 19:

> Rule 19 dictates that all necessary parties must be joined in an action. Rule 19 requires the trial court to join as a necessary party any persons united in interest and/or any persons without whom a complete determination of the claim cannot be made since a judgment without such necessary joinder is void. A party does not waive the defense of failure to join a necessary party; an objection on this basis can be raised at any time. *A reviewing court is required to raise the issue ex mero motu to protect its jurisdiction.*

Commonwealth Land Title Ins. Co. v. Stephenson, 97 N.C. App. 123, 125, 387 S.E.2d 77, 79 (1990) (emphasis added) (citations, quotation marks, brackets, and ellipsis omitted).

Under North Carolina General Statute § 50A-370(b), only the parents may bring a claim under the UDPCVA, so Stepmother could not have filed the motion. N.C. Gen. Stat. § 50A-370(b). Under North Carolina General Statute § 50A-375(b), the trial court is directed to make a person to whom limited contact is granted "a party to the action until the grant of limited contact is terminated." N.C. Gen. Stat. § 50A-375(b). "It is well established that 'the word "shall" is generally imperative or mandatory.' " *Multiple Claimants v. N. Carolina Dep't of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). In addition, "[a] nonparent granted caretaking authority, decision-making authority, or limited contact under this Part has standing to enforce the grant until it is terminated under Part 4 of this Article or by court order." N.C. Gen. Stat. § 50A-376(b). Thus, Stepmother would have standing to enforce the order under North Carolina General Statute § 50A-376(b). The order also specifically directs Stepmother to participate in the visitation schedule for Elizabeth and to "work together" with Mother to ensure that Elizabeth does not miss special events and that she will see her step and half siblings for "major holidays, including Thanksgiving and Christmas."

We also recognize that in custody cases, our Courts have previously recognized "de facto parties" where a nonparent has been granted custodial rights by a court order and have allowed the "de facto" parties to be formally added as parties even after entry of a court order or on appeal. In *Sloan v. Sloan*, this Court noted

> Moreover, after a trial court has awarded custody to a person who was not a party to the action or proceeding, this Court has held that
>
> > it would be proper and advisable for that person to be made a party to the action or proceeding to the end that such party would be subject to orders of the court. This may be done even after judgment and by the appellate court when the case is appealed.
>
> By filing a motion to intervene in the matter, intervenors were simply requesting to be formally recognized as parties to a child custody action in which they had already been awarded visitation rights. Therefore, the trial court did not err in granting their motion to intervene even after the order determining permanent custody of C.S. was entered.

164 N.C. App. 190, 194-95, 595 S.E.2d 228, 231 (2004) (citation, ellipsis, and brackets omitted).

Therefore, Stepmother was treated as a "de facto" party based upon the trial court's order granting her limited contact and ordering her to take specific actions, and the fact that the trial court did not formally order her to be added as a party does not impair our jurisdiction. As noted in *In re Custody of Branch*, it is "proper and advisable" for Stepmother to be "made a party to the action or proceeding to the end that such party would be subject to orders of the court." 16 N.C. App. 413, 415, 192 S.E.2d 43, 45 (1972). "We have held, however, that this may be done even after judgment and by the appellate court when the case is appealed." *Id.* Based upon North Carolina General Statute § 50A-375, Stepmother should be made a party to this action "until the grant of limited contact is terminated," so we will remand the order on appeal for the trial court to include this provision.

IV. Standard of Review

No case has yet addressed the standard of review for custodial responsibility orders under the UDPCVA. The issues presented here are primarily statutory construction issues, which we review de novo:

> We review issues of statutory construction de novo. In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute. A statute that is clear on its face must be enforced as written. Courts, in interpreting the clear and unambiguous text of a statute, must give it its plain and definite meaning, as there is no room for judicial construction. . . .
>
> In applying the language of a statute, and because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used. Finally, we must be guided by the fundamental rule of statutory construction that statutes in pari materia, and all parts thereof, should be construed together and compared with each other.

Hill v. Hill, ___ N.C. App. ___, ___, 821 S.E.2d 210, 227-28 (2018) (alteration in original) (quoting *In re Ivey*, ___ N.C. App. ___, ___, 810 S.E.2d 740, 744 (2018)).

Father challenges none of the trial court's findings of fact as unsupported by the evidence, so where the trial court has correctly interpreted the statute, we review the trial court's conclusions of law to determine if they are supported by the findings of fact. *Shipman v. Shipman*, 357 N.C. 471, 475, 586 S.E.2d 250, 254 (2003). "Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007).

V. Caretaking and Decision-Making Authority for Elizabeth

Just as the underlying custody order provisions for Elizabeth and Jay differ, the trial court's order under the UDPCVA also has different provisions for Elizabeth and Jay. As to Elizabeth, the trial court granted limited contact; as to Jay, the trial court denied Father's motion entirely. We will therefore address the provisions of the order regarding Elizabeth and Jay separately.

A. "Prior Judicial Order" under N.C. Gen. Stat § 50A-373

[3] Father does not challenge the trial court's findings of fact but argues the trial court erred by denying caretaking authority or decision-making authority as to Elizabeth. The trial court granted only limited contact with Elizabeth to Stepmother. Father argues first that Elizabeth's Consent Order does not "directly address a deployment but only addresses 'Temporary Military Duty' or 'Active Duty.' " He contends that these terms, as used in Elizabeth's Consent Order, refer to his "military activity during his once a month drill or when he is sent away for required military training in preparation for a deployment." Thus, Father argues, since Elizabeth's Consent Order does not address deployment, it is not a "prior judicial order designating custodial responsibility of a child *in the event of deployment*." N.C. Gen. Stat. § 50A-373(1) (emphasis added). Father contends that the trial court should have considered his claim as to Elizabeth under North Carolina General Statute § 50A-374, which controls in the absence of a "prior judicial order" addressing deployment.

Mother agrees with Father that Elizabeth's Consent Order "does not specifically refer to the term 'deployment' so it is not a 'prior judicial [order]' as contemplated by N.G. Gen. Stat. § 50A-373(1)." She agrees that "N.C.G.S. § 50A-374 was the governing statute for the trial court to determine whether to grant caretaking and decision-making authority for" Elizabeth and contends the trial court applied it properly since North Carolina General Statute § 50A-374 says the court may grant caretaking authority to a nonparent but does not require that it do so.

The trial court first made detailed findings of fact regarding the prior orders and various family members, including Stepmother, the children's stepsister, and their half brother. As to Elizabeth, the trial court made these relevant findings of fact and conclusions of law:

> 15. [Mother] has not cut off access to both minor children to [Stepmother] or to their step-sister and half-brother.
>
> 16. [Mother] and [Stepmother] communicate better with each other than the parties do with one another.
>
> 17. [Mother] and [Stepmother] seem to work out these children maintaining a relationship amongst themselves and both are acting in the children's best interests.
>
> . . . .

19. There is a prior permanent custody order in place for the minor child [Elizabeth]. The order refers to "active duty," but not specifically to "deployment."

20. There are sufficient circumstances to grant limited contact as to [Elizabeth] but deny custodial responsibility and decision making authority. The terms of the prior order are sufficient to address custodial/decision-making authority.

21. Sufficient circumstances exist to allow [Stepmother] limited contact with [Elizabeth] as described herein.

22. [Mother] and [Stepmother] can do a great job in keeping these four children in contact with one another and that both of them want to see these children thrive.

23. [Mother] and [Stepmother] can augment the above limited contact in ways that are beneficial to all four of the above-mentioned children even though only two of them are subject to this order.

24. [Mother] and [Stepmother] have not acted in any way other than keeping the four children in contact with one another and allowing the children to thrive.

. . . .

Based on the foregoing FINDINGS OF FACT, the Court makes the following:

CONCLUSIONS OF LAW

1. The facts as set forth in paragraphs 1 through 25 above are fully incorporated herein by reference to the extent that they are also conclusions of law.

2. The Court has jurisdiction of the parties and the subject matter of this action.

3. That there are not sufficient circumstances to modify the previous custody orders of [Elizabeth] and [Jay] to allow custodial responsibility and grant decision making authority to [Stepmother.]

4. That [Elizabeth's] custody order is not clear on limited contact in the event of Plaintiff's deployment and limited

> contact as to [Elizabeth] to [Stepmother] is granted as described herein.
>
> 5. That NCGS §50A-373 specifically says, "In a proceeding for a grant of custodial responsibility pursuant to this Part"
>
> 6. That NCGS §50A-373 and §50A-375 are both located in Part 3 of Article 3, Chapter 50A of the North Carolina General Statutes.
>
> 7. That the grant of Limited Contact is a proceeding of Part 3 of Article 3, Chapter 50A of the North Carolina General Statutes and is subject to NCGS §50A-373.

Although Mother and Father both contend in their briefs that the claim for a custodial responsibility order for Elizabeth is not subject to North Carolina General Statute § 50A-373, we disagree, at least in part. We will first address the "Judicial Procedure for Granting Custodial Responsibility During Deployment" as set out in Part 3 of the UPDCVA. Part 3 sets out provisions applicable to the trial court's resolution of a claim for a custodial responsibility order. N.C. Gen. Stat. §§ 50A-370-384. North Carolina General Statute § 50A-373 titled, "Effect of a prior judicial decree or agreement,"[9] governs cases in which the parents have an existing order or agreement addressing "custodial responsibility of a child in the event of deployment":

> In a proceeding for a grant of custodial responsibility pursuant to this Part, the following shall apply:
>
> (1) A prior judicial order designating custodial responsibility of a child in the event of deployment is binding on the court unless the circumstances require modifying a judicial order regarding custodial responsibility.

N.C. Gen. Stat. § 50A-373.

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9. We note that the Uniform Act entitles this same section "Effect of Prior Judicial *Order* or Agreement," while North Carolina General Statute § 50A-373 is titled "Effect of prior judicial *decree* or agreement." (Emphasis added.) Yet the substantive language of both the Uniform Act and North Carolina statute uses the same terminology: "A prior judicial *order* . . . ." N.C. Gen. Stat. § 50A-373. The Official Comments following the section also use the term "decree" instead of "order." We have been unable to determine any relevant difference between the terms "order" and "decree" for purposes of this case.

B. Terminology

One issue noted by the Prefatory Note to the Uniform Act is "The Problem of Differing Terminology":

> The UDPCVA seeks to establish uniformity in the terminology used in custody cases arising from deployment, given the prospect that many of these cases will involve more than one jurisdiction. States, however, currently differ on the terminology that they use to describe issues of custody and visitation. In enacting the UDPCVA, states are encouraged to add any state specific terminology to the definitions of the specific terms used in the Act, without replacing the Act's specific terms or deleting the existing definitions of those terms. Use of common terms and definitions by states enacting the Act will facilitate resolution of cases involving multiple jurisdictions.

Unif. Deploy. Parent Cust. & Vist. Act, Prefatory Note.

The terminology used by the UDPCVA is crucial to both the parents' arguments and our analysis, so we will first address the meaning of the controlling terms. The UDPCVA includes definitions of many terms, and where the statute has provided a definition, we must use that definition. *See Knight Pub. Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 492, 616 S.E.2d 602, 607 (2005) ("If a statute 'contains a definition of a word used therein, that definition controls,' but nothing else appearing, 'words must be given their common and ordinary meaning[.]' " (alteration in original) (quoting *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974)).

North Carolina's UDPCVA was adopted in 2013 with only a few variations from the Uniform Act. North Carolina General Statute § 50A-395, titled "Uniformity of application and construction" requires that "[i]n applying and construing this Article, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." N.C. Gen. Stat. § 50A-395. Very few other state appellate courts have addressed orders issued under the UDPCVA, and none have addressed the issues raised in this case. We will consider any differences between the Uniform Act and the law as adopted in North Carolina to determine if they are relevant to the issues in this case, and we will consider the Prefatory Note and Comments to the Uniform Act as applicable. As to any terminology used by the Uniform Act and adopted by North Carolina, we will seek to interpret terms as intended under the Uniform Act "to promote uniformity of the law with

respect to its subject matter." *Id.* We will therefore use the specific terms as stated in the UDPCVA in accord with their definitions and will include terms used in North Carolina "without replacing the Act's specific terms or deleting the existing definitions of those terms." *Id.*

C. "Custodial Responsibility"

There is no dispute that Elizabeth's Consent Order is a "prior judicial order," as it is an order previously issued in Elizabeth's custody case. The issue on appeal arises based upon the rest of the phrase: "designating custodial responsibility of a child in the event of deployment." N.C. Gen. Stat. § 50A-373(1). The first term we must consider is "custodial responsibility." The UDPCVA uses several terms unique to the Uniform Act to address various aspects of custody, recognizing that different states use different terminology. "Custodial responsibility" is the "umbrella term" for the various aspects of custody:

> The UDPCVA establishes one umbrella term, "custodial responsibility," for all issues relating to custody, including the responsibility often referred to in other state custody law as physical custody, visitation, and legal custody. The Act also establishes three sub-categories of custodial responsibility that can be transferred to others during deployment: "caretaking authority," "decision-making authority," and "limited contact." The terminology used for each of these sub-categories is original to the UDPCVA. The term "caretaking authority" is meant to encompass the authority to live with, spend time with, or visit with a child. States often use a number of terms that fall within this definition, including "primary physical custody," "secondary physical custody," "visitation," and "possessory conservatorship." All these are meant to be subsumed under the term "caretaking authority."
>
> In contrast, the term "decision-making authority" means the authority to make decisions about a child's life beyond the authority that ordinarily accompanies a transfer of caretaking authority under state custody law. This term is meant to encompass the authority referred to in many states as "legal custody," including the authority reasonably necessary to make decisions such as the ability to enroll the child in a local school, to deal with health care, to participate in religious training, and to allow the child to engage in extracurricular activities and travel.

> Finally, the term "limited contact" refers to a form of visitation with the child given to nonparents on the request of a deployed service member. This type of visitation allows the service member to sustain his or her relationship with the child through designating either a family member or other person with whom the child has a close relationship to spend time with the child during the service member's absence. The limited contact definition allows the possibility that it may be granted to minors as well as adults. Thus a minor half-sibling or step-sibling of the child could be granted limited contact during a service member's deployment. This type of contact with the child is a more limited form of visitation than courts usually grant to parents or grandparents outside the deployment context.

N.C. Gen. Stat. § 50A-351 Official Comment.

Elizabeth's Consent Order addressed physical custody and visitation, comparable to "caretaking;" we have quoted some of those provisions above. The Consent Order also had detailed provisions under the heading "Legal Custody" which addressed joint decision-making in the "major areas of parenting, as often as possible," including subsections addressing day-to-day decisions; medical treatment; education; extracurricular activities; and travel out of state. It also addressed decision-making when Father is "deployed or otherwise unavailable due to his military status and therefore he be [sic] unable to respond to Defendant surrounding a matter that would generally fall under legal custody as described herein."

But Elizabeth's Order does not address "limited contact," which differs somewhat from the types of provisions typically included in a consent order between two parents addressing only their own custody and visitation rights under Chapter 50. "Limited contact" is a form of visitation with nonparents; under Chapter 50, a trial court can grant visitation to nonparents only in very limited circumstances. *See McIntyre v. McIntyre*, 341 N.C. 629, 635, 461 S.E.2d 745, 749-50 (1995) (finding grandparents have the right to seek visitation "only in certain clearly specified situations"). This type of visitation with persons other than parents can be addressed by an order or agreement, but in this instance, the parents did not set forth any form of "limited contact" with any nonparent.[10]

10. As noted above, Elizabeth's Consent Order included a provision regarding intervention by the maternal grandmother and her request for grandparent visitation rights was reserved.

D. "Deployment"

The next term in contention here is "deployment." Fortunately, the UDPCVA also defines deployment:

> The movement or mobilization of a service member to a location for more than 90 days, but less than 18 months, pursuant to an official order that (i) is designated as unaccompanied; (ii) does not authorize dependent travel; or (iii) otherwise does not permit the movement of family members to that location.

N.C. Gen. Stat. § 50A-351(9).

Both Mother and Father contend that Elizabeth's Consent Order refers to "Temporary Military Duty" and "Active Duty" but not specifically "deployment." This is not entirely correct, as the order includes a decision-making provision which specifically includes deployment:

> The parties further stipulate and agree that should Plaintiff be *deployed or otherwise unavailable due to his military status* and therefore he be unable to respond to Defendant surrounding a matter that would generally fall under legal custody as described herein, Defendant shall be entitled to solely make said decision after waiting forty-eight (48) hours to hear back from Plaintiff short of an emergency.

(Emphasis added.)

Certainly, the parents were using the common meaning of "deployment" in the Consent Order and not the specific definition under the UDPCVA but that does not mean that Elizabeth's Consent Order provisions do not address the circumstances described as "deployment" as defined by North Carolina General Statute § 50A-351(9). Both deployment and active duty are defined by the Department of Defense, and we look to those definitions to aid our interpretation. Active duty is defined as, "Full-time duty in the active military service of the United States, including active duty or full-time training duty in the Reserve Component." U.S. Dep't of Defense, Dictionary of Military and Associated Terms, 7 (May 2019). Deployment is defined as, "The movement of forces into and out of an operational area." *Id.* at 65.

The terms of Elizabeth's order actually contemplate several types of military duty by Father, ranging from weekend drill—which would not be "deployment" as defined by the UDPCVA due to the short time duration—to "Active Duty," which is the type of duty Father was

deployed to perform. One subsection of the order, following the regular weekly schedule, addresses a variation to the schedule for his monthly drill weekends: "Military Duty: In the event that the Plaintiff has an USAR Drill Weekend (also known as a 'Battle Assembly'), he shall pick up the minor child by 6:00 PM on Sunday to begin his physical custodial time." Later, the Consent Order addresses longer term assignments in a section referring to "Temporary Military Duty" and "Active Duty," including "*any* Temporary Military Duty that would impact the Regular Weekly Schedule set forth above." (Emphasis added.) Father's deployment to Africa for over a year obviously "impact[s] the Regular Weekly Schedule." Thus, Elizabeth's Consent Order is "[a] *prior judicial order* designating *custodial responsibility* of a child *in the event of deployment*[.]" N.C. Gen. Stat. § 50A-373(1) (emphasis added). Although the Consent Order does not address limited contact, it addresses caretaking authority and decision-making authority in the event of deployment.

E. Application of N.C. Gen. Stat. 50A-373

We have determined that Elizabeth's Consent Order is "[a] prior judicial order designating custodial responsibility of a child in the event of deployment," so it is "binding on the court unless the circumstances require modifying a judicial order regarding custodial responsibility." N.C. Gen. Stat. §50A-373(1). As noted above, the Consent Order addresses only "caretaking" and "decision-making," so it was "binding" on the trial court "*unless the circumstances require modifying* a judicial order regarding custodial responsibility." *Id.* (emphasis added). The trial court found "the terms of the prior order are sufficient to address custodial/decision-making authority." But Father argues that

> [i]t is well established in North Carolina that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a "substantial change of circumstances affecting the welfare of the child" warrants a change in custody provided that the change is in the best interest of the child.
>
> However, the North Carolina legislature enacted North Carolina's UDPCVA with a weaker "circumstances require" in NCGS §50A-373(1) versus "circumstances meet the requirements of law of this state other than this [act] for modifying a judicial order regarding custodial responsibility," of the model act section 305(1). Plaintiff/Appellant's position is that "circumstances required" is too nebulous to be considered anything but the

> normal conditions to modify a custody order. Therefore, [Elizabeth's] order should not be viewed for caretaking authority through NCGS §50A-373(1) but through NCGS 50A-374.

(Citations omitted.)

North Carolina General Statute § 50A-373 differs from the Uniform Act's comparable Section 305, as noted by Father, in a manner he contends inappropriately gives the trial court entirely unlimited discretion to enter or to refuse to enter a custodial responsibility order contrary to a "prior judicial order" which addresses custody in the event of deployment. The UDPCVA provides no specific guidance on why our General Assembly substituted the terms "circumstances require" for "circumstances meet the requirements of law of this state other than this [act] for modifying a judicial order regarding custodial responsibility." But North Carolina General Statute § 50A-395 requires us to give consideration "to the need to promote uniformity of the law with respect to its subject matter among states that enact it." N.C. Gen. Stat. § 50A-395. In addition, the General Assembly adopted the Comments to Section 305 of the Uniform Act, and these comments address the language of the Uniform Act, despite the difference in the language adopted by North Carolina. The Official Comment notes that

> [s]ection 305 [G.S. 50A-373] governs the court's consideration of a past judicial decree or agreement between the parents that specifically contemplates custody during a service member's deployment. In crafting this provision, the UDPCVA seeks to give significant deference to past decrees and agreements in which issues of custody during deployment have already been considered and resolved. At the same time, it seeks to balance the value of certainty gained by leaving settled matters settled against the recognition that in some circumstances past determinations may no longer be in the best interest of the child.
>
> This provision gives somewhat more deference to custody provisions in prior judicial decrees than in out-of-court agreements. *To overturn the former, the challenger must first meet the state's standard for modifying a judicial decree regarding custodial responsibility. In most states, this standard requires that there be a showing of a substantial or material change of circumstances that was not foreseeable at the time the prior judicial decree*

> *was entered.* Only if a challenger meets that showing, as well as overcomes the presumption that the previous decree was in the best interest of the child, may the court modify the earlier decree. In contrast, the challenger of a custody provision established in a past agreement needs only to overcome the presumption that the provision is in the best interest of the child.

N.C. Gen. Stat. § 50A-373 Official Comment (alteration in original) (emphasis added).

By rejecting the phrase "meet the requirements of the law of this state other than this [act]" as used in the Uniform Act, the General Assembly was removing the portion of the statute which would arguably have required the exact same substantial change of circumstances as the standard for modification of a prior permanent custody order under North Carolina's UDPCVA. As enacted in North Carolina, the UPDCVA allows the trial court to modify a prior custody order with a lesser showing than would normally be required for modification of a permanent order. In other words, the movant need not prove a "substantial change in circumstances that was not foreseeable at the time the prior judicial decree was entered[,]" as described in the Official Comments. *See* N.C. Gen. Stat. § 50A-373 Official Comment (allowing an existing custody order to be modified if the "circumstances require" which is left to the trial court to determine).

This lesser standard for "circumstances" which "require" modification is in accord with the purpose of the UDPCVA. It is intended to address "issues of child custody and visitation that arise when parents are deployed in military or other national service" since "deployment in national service raises custody issues that are not adequately dealt with in the law of most states." Unif. Deploy. Parent Cust. & Vist. Act, Prefatory Note. If a motion to modify a prior permanent custody order based upon a substantial change of circumstances affecting the best interests of the children under North Carolina General Statute § 50-13.7 adequately addressed the custody concerns of deployed parents and their families, there would be no need for the UDPCVA to address the standard for modification at all. Often, the parents will have an existing order or agreement, which may or may not address deployment or as in this case, the order may address some aspects of custodial responsibility but not others. The UDPCVA seeks to enable deployed parents to obtain an order quickly and to preserve not just the relationship between the deployed parent and child, but also between the child and the deployed

parent's other family members or others who have a substantial relationship with the child based upon the deployed parent.

Although we agree with Father that the phrase "circumstances require" may seem "nebulous," it is given more content and meaning when read in context with the other applicable provisions of the UDPCVA and the "polar star" of all child custody cases: the best interests of the child.[11]

> In custody matters, the best interests of the child is the polar star by which the court must be guided. Although the trial judge is granted wide discretion, a judgment awarding permanent custody must contain findings of fact in support of the required conclusion of law that custody has been awarded to the person who will best promote the interest and welfare of the child. These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child. The welfare of the child is the paramount consideration to which all other factors, including common law preferential rights of the parents, must be deferred or subordinated.

McRoy v. Hodges, 160 N.C. App. 381, 386-87, 585 S.E.2d 441, 445 (2003) (citations, quotation marks, and ellipsis omitted).

The trial court must give deference to a "prior judicial order" which addresses "custodial responsibility" in the event of deployment, but if "circumstances require," it may enter an order under the UDPCVA with additional terms for any aspect of "custodial responsibility," including caretaking, decision-making, or limited contact. *See* N.C. Gen. Stat. §50A-373(a). Although it is not clear from the trial court's conclusions of law exactly how it determined North Carolina General Statute

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11. North Carolina General Statute § 50A-374, the statute Father argues should apply to his motion as to Elizabeth, grants the trial court discretion to grant caretaking authority if it is in the best interest of the child. N.C. Gen. Stat. § 50A-374(a) ("*In accordance with the laws of this State* and on the motion of a deploying parent, a court *may* grant caretaking authority of a child to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship if it is *in the best interest of the child*." (emphasis added)). Several other sections of the UDPCVA also refer to "the law of this State" and "best interest of the child." *See* N.C. Gen. Stat. § 50A-352, 373, 374, 375, 377, 378, 379, 387 & 388. The UDPCVA incorporates the "best interest" standard explicitly in various sections. *See* N.G. Gen. Stat. §§ 50A-373(b), 375(a), 377(3)-(4), 379(a), 387.

§ 50A-373 applied to Elizabeth's Consent Order, the trial court's rationale is clear. Essentially, the trial court examined the relationships between Mother, Stepmother, and all four children; noted the admirable cooperation between Mother and Stepmother; examined the existing provisions of Elizabeth's Consent Order; and determined that the circumstances required no change to the provisions of the order regarding caretaking or decision-making, but that it would be in Elizabeth's best interest to have limited contact as set out in the order.

F. Caretaking Authority

[4] Father argues that the trial court was not bound by Elizabeth's Consent Order and erred by not granting Stepmother caretaking authority under North Carolina General Statute §50A-374, which provides that the trial court "*may* grant caretaking authority of a child to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship if it is in the best interest of the child." N.C. Gen. Stat. § 50A-374(a) (emphasis added). Even if we agreed with Father that Elizabeth's Consent Order was not binding on the trial court, the trial court had the discretion to grant caretaking authority under North Carolina General Statute § 374 but was not required to do so.

> "As used in statutes, the word 'shall' is generally imperative or mandatory." *In contrast, "may" is generally intended to convey that the power granted can be exercised in the actor's discretion, but the actor need not exercise that discretion at all.*

Silver v. Halifax Cty. Bd. of Commissioners, ___ N.C. ___, ___, 821 S.E.2d 755, 761 (2018) (emphasis added) (citation omitted).

Father has not shown that the trial court abused its discretion by denying caretaking authority to Stepmother. The trial court's findings show it carefully considered the entire family's situation and tailored the order to address Elizabeth's needs, so we cannot discern any abuse of discretion. *See Walsh v. Jones*, ___ N.C. App. ___, ___, 824 S.E.2d 129, 134 (2019) ("Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges." (quoting *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253-54)).

G. Decision-Making Authority

[5] Father also argues that the trial court erred by not granting Stepmother decision-making authority under North Carolina General Statute § 50A-374, which provides that the trial court

> *may* grant part of the deploying parent's decision-making authority for a child to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship *if the deploying parent is unable to exercise that authority*. When a court grants the authority to a nonparent, the court shall specify the decision-making powers that will and will not be granted, including applicable health, educational, and religious decisions.

N.C. Gen. Stat. § 50A-374(c) (emphasis added).

Father argues that Elizabeth's Consent Order, which requires him to respond to Mother within 48 hours regarding decisions they are to make jointly, are not practicable during his deployment since he will be "on another continent" and although he may have access to "video chatting and email, his military duty frequently requires him to be away from civilian communications for days at a time." Since he may be unable to be reached or unable to respond within 48 hours, he contends that Stepmother knows "his wishes" on a "wide variety of subjects," she should be allowed to step into his role in joint decision-making with Mother. But we note that Father did not testify at the hearing, and Stepmother did not testify regarding Father's duties during his deployment, his actual communication options, or his potential lack of access to "video chatting or email" during his deployment. Since Father presented no evidence on these facts, we will generously assume that Father's argument is generally based upon the "communications" section of Elizabeth's Consent Order, which provides for the parents to "share and exchange information" "via telephone, email and text messages."

Just as for caretaking authority, decision-making authority is a discretionary ruling, but this subsection provides a condition precedent: the trial court *may* grant decision-making authority to a nonparent "*if* the deploying parent is unable to exercise that authority." *Id.* Father did not present evidence regarding his potential lack of ability to communicate with Mother by "telephone, email and text messages," as provided by Elizabeth's Consent Order. Where Father did not present evidence that his military duties would substantially interfere with his ability to use these forms of communication or that he would normally be unable

to respond to Mother within 48 hours, the trial court had no basis upon which to find that Father would be "unable to exercise" his decision-making authority. Father has not demonstrated any abuse of discretion by the trial court's denial of decision-making authority to Stepmother.

H. Limited Contact

[6] Since Elizabeth's Consent Order did not address the aspect of "custodial responsibility" defined by the UDPCVA as "limited contact," the trial court's consideration of "limited contact" was governed by North Carolina General Statute §50A-375:

> In accordance with laws of this State and on motion of a deploying parent, a court *shall* grant limited contact with a child to a nonparent who is either a family member of the child or an individual with whom the child has a close and substantial relationship, *unless the court finds that the contact would be contrary to the best interest of the child.*

N.C. Gen. Stat. § 50A-375(a) (emphasis added). The trial court did grant Stepmother "limited contact" for Elizabeth, but Father argues that the trial court erred because the amount of time granted was "substantially reduced from" the time granted to Father by Elizabeth's Consent Order. He contends that the reduction in contact between Elizabeth and her stepsister and half brother is not in her best interest.

Unlike "caretaking authority" and "decision-making authority" under North Carolina General Statute § 50A-374, North Carolina General Statute § 50A-375 uses mandatory language. The trial court "*shall* grant limited contact with a child to a nonparent who is either a family member of the child or an individual with whom the child has a close and substantial relationship, *unless* the court finds that the contact would be contrary to the best interest of the child." *Id.* (emphasis added). "It is well established that 'the word "shall" is generally imperative or mandatory.' " *Multiple*, 361 N.C. at 378, 646 S.E.2d at 360 (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). Therefore, the trial court is not required to grant caretaking or decision-making authority, but the trial court is obligated to grant limited contact with a nonparent who has a "close and substantial relationship" with the child unless the court finds that doing so would be contrary to the best interest of the child. *See* N.C. Gen. Stat. §§ 50A-374-375.

Based upon the trial court's findings, it determined that continued contact between Elizabeth and Stepmother and her stepsister and half brother was in her best interest. But Elizabeth's Consent Order did not

address limited contact with a nonparent, and the trial court was not bound by the schedule of custodial time granted to Father in the Order. The actual schedule and amount of limited contact with a nonparent remains within the discretion of the trial court. Here, Elizabeth and Jay already had different custodial schedules based upon the difference in their ages and needs. The trial court did not abuse its discretion by granting "limited contact" to Elizabeth on a different and lesser schedule than Father's usual custodial time under her Consent order.

We also note that Father has not specifically argued, and we have therefore not considered, whether the trial court should have considered any separate grant of limited contact between Elizabeth and her step or half siblings. North Carolina General Statute § 50A-375 provides that "a court shall grant limited contact with a child to a nonparent who is either a family member of the child or an individual with whom the child has a close and substantial relationship . . . ." N.C. Gen. Stat. § 50A-375(a). A "nonparent" is "[a]n individual other than a deploying parent or other parent." N.C. Gen. Stat. § 50A-351(12). A "close and substantial relationship" is "[a] relationship in which a significant bond exists between a child and a nonparent." N.C. Gen. Stat. § 50A-351. The Official Comment notes that

> [t]he limited contact definition allows the possibility that it may be granted to minors as well as adults. Thus a minor half-sibling or step-sibling of the child could be granted limited contact during a service member's deployment. This type of contact with the child is a more limited form of visitation than courts usually grant to parents or grandparents outside the deployment context.

N.C. Gen. Stat. 50A-351 Official Comment. Although an order under the UDPCVA can grant contact to another child, as opposed to the stepparent or other adult nonparent, the order on appeal grants the limited time to Stepmother, not to her son or daughter.[12] The order contemplates that time with Stepmother will normally include her other children as well, thus maintaining the relationships among the children.

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12. Since the UDPCVA provides that "[*a*]*ny* nonparent who is granted limited contact *shall be made a party to the action* until the grant of limited contact is terminated," it would appear that if limited contact were granted to a minor child, the minor child would need to be "made a party to the action," a prospect which may present additional procedural complications which a trial court would need to consider carefully. N.C. Gen. Stat. § 50A-375(b) (emphasis added).

Overall, the trial court's order properly struck the balance between deference to Elizabeth's Consent Order and the unique provisions for "limited contact" with a nonparent under North Carolina General Statute § 50A-375. The order's findings of fact support its conclusions of law, and Father has shown no abuse of discretion as to the provisions for "limited contact" as to Elizabeth.

VI. Jay's Order

A. Provisions of Order on Appeal

[7] In addition to the findings of fact and conclusions of law quoted above, the order includes the following findings of fact (which may be more appropriately considered as a conclusions of law) regarding Jay:

> 13. The prior custody order for the minor child, [Jay] designates custodial responsibility during Plaintiff [Father's] deployment on behalf of the US Army and that order is binding on this court.
>
> 14. The court finds that circumstances do not require modification of said order.

Jay's prior order provided as follows regarding deployment:

> g. Should Plaintiff be unable to exercise his custodial time described herein due to travel for work or any form of military duty, including but not limited to: temporary military duty, active duty or deployment, the minor child shall remain in [Mother's] custody.

Jay's order also provided for joint decision-making in much the same manner as Elizabeth's consent order. Jay's order was entered by the trial court separately from Elizabeth's Consent Order and it is a temporary custody order. The order provides that a hearing upon Jay's permanent custody would not be "scheduled before December 2017."

B. Distinction Between Temporary and Permanent Prior Order for Purposes of N.C. Gen. Stat. § 50A-373(1)

Father first argues that because Jay's Order is a temporary order, it is not a "prior judicial order" under North Carolina General Statute § 50A-373 because "it is well settled law in North Carolina that a temporary order entered under N.C. Gen. Stat. §13.5(d3) can be revisited without a change in circumstances needed" but only upon consideration of the child's best interests. He contends that the trial court "must

view it through N.C. Gen. Stat. § 50A-373 as a 'circumstances required' equals the best interest of the child standard or through N.C. Gen. Stat. § 50A-374, which statutorily requires a view as the best interest of the child." Mother contends that North Carolina General Statute § 50A-373(1) refers to a "prior judicial order" and makes no distinction between temporary or permanent prior judicial orders. She also argues that Father has not cited any authority in support of his argument for a distinction between temporary and permanent orders for purposes of North Carolina General Statute § 50A-373(1). She is correct, but since no case in the United States has addressed this issue, neither Father nor Mother could have cited any case as authority under the UDPCVA on this point. But the language of the statute makes it clear that "prior judicial order" includes both temporary and permanent orders.

In several sections the UDPCVA makes the distinction between permanent and temporary orders, and it is obvious from the Act overall and the Comments to the Uniform Act these words were carefully chosen, while North Carolina General Statute § 50A-373(1) instead uses the inclusive and non-specific term "prior judicial order." For example, under North Carolina General Statute § 50A-353,[13] regarding jurisdiction, the statute distinguishes between prior temporary and permanent orders regarding custodial responsibility for purposes of determining jurisdiction under the UCCJEA. In North Carolina General Statute § 50A-374(b), the statute refers to an "existing permanent custody order":

> Unless the grant of caretaking authority to a nonparent under subsection (a) of this section is agreed to by the other parent, the grant is limited to an amount of time not greater than (i) the time granted to the deploying parent in an existing permanent custody order, except that the court may add unusual travel time necessary to transport the child or (ii) in the absence of an existing permanent custody order, the amount of time that the deploying parent habitually cared for the child before being notified of

13. "(b) If a court has issued a *permanent order regarding custodial responsibility* before notice of deployment and the parents modify that order temporarily by agreement pursuant to Part 2 of this Article, for purposes of the UCCJEA, the residence of the deploying parent is not changed by reason of the deployment.

(c) If a court in another state has issued a *temporary order regarding custodial responsibility* as a result of impending or current deployment, for purposes of the UCCJEA, the residence of the deploying parent is not changed by reason of the deployment." N.C. Gen. Stat. § 50A-353 (emphasis added).

> deployment, except that the court may add unusual travel time necessary to transport the child.

N.C. Gen. Stat. § 50A-374(b). Therefore, the UDPCVA gives greater weight to a prior *permanent* custody order than a prior temporary order for purposes of jurisdiction under the UCCJEA and the terms of a grant of caretaking authority. But under North Carolina General Statute § 50A-373, the term "prior judicial order" encompasses both temporary and permanent custody orders. A permanent order is given more weight for the specific purposes set out in the UDPCVA, but Jay's temporary order is a "prior judicial order" for purposes of North Carolina General Statute § 50A-373(a).

C. Denial of Caretaking Authority and Decision-Making Authority

Both Mother and Father acknowledge that Jay's order more clearly addresses custodial responsibility in the event of Father's deployment than did Elizabeth's Consent Order, discussed above. Jay's order uses the specific term "deployment," although, as discussed above, use of that specific term is not necessarily controlling. If the provisions of the prior judicial order encompass custodial responsibility under the circumstances described in North Carolina General Statute § 50A-351(9), it is a "prior judicial order designating custodial responsibility of a child in the event of deployment" and it "is binding on the court unless the circumstances require modifying a judicial order regarding custodial responsibility." N.C. Gen. Stat. § 50A-373.

Also, as discussed above regarding Elizabeth's Consent Order, the standard for modifying the provisions of the prior judicial order is lesser than the substantial change in circumstances normally required for modification of a permanent custody order under Chapter 50, and the trial court has the discretion to determine if the "circumstances require" entry of an order if in the best interests of the child. Father argues that his "objective" in bringing his motion under the UDPCVA was to "keep both children's custody situation the same as when as when he was not deployed." Father's goal is understandable, but it is impossible to keep their "custody situation" *the same* since he—the children's Father—is not in the home. In some circumstances, a trial court may determine that the custodial schedule should remain the same, despite the absence of the parent, but based upon the trial court's findings of fact, we see no abuse of discretion in the trial court's determination that circumstances did not require modification of the caretaking authority or decision-making authority as set forth in Jay's order, for the same reasons as stated above for Elizabeth.

D. Limited Contact

[8] Just as Elizabeth's Consent Order did not address the aspect of "custodial responsibility" defined by the UDPCVA as "limited contact," Jay's order had no provisions for "limited contact." Thus, Jay's order was not binding on the trial court as to limited contact. In addition, the trial court's consideration of "limited contact" was governed by North Carolina General Statute § 50A-375:

> In accordance with laws of this State and on motion of a deploying parent, a court shall grant limited contact with a child to a nonparent who is either a family member of the child or an individual with whom the child has a close and substantial relationship, unless the court finds that the contact would be contrary to the best interest of the child.

N.C. Gen. Stat. § 50A-375(a).

As discussed above, the language of North Carolina General Statute § 50A-375 is mandatory, but there are two conditions for granting limited contact: (1) the child has a "close and substantial relationship" with the nonparent, and (2) contact with the nonparent is not contrary to the best interest of the child. *Id.* The trial court's findings do not specifically state whether Jay has a "close and substantial relationship"—a term defined by North Carolina General Statute § 50A-351(4)—with Stepmother or his step and half siblings, but the overall import of the evidence and findings suggests that he does have this type of relationship with Stepmother. In fact, Mother's response to Father's motion for an order under the UDPCVA admits many allegations regarding the relationships between both children, Stepmother, and their step and half siblings. The trial court noted that both Mother and Stepmother were working together to maintain the relationships among the four children and were acting in their best interests. Nothing in the trial court's order suggests that limited contact with Stepmother would be "*contrary* to the best interest of" Jay.

The trial court determined that under North Carolina General Statute § 50A-373(1), it could not grant limited contact to Stepmother for Jay based upon Jay's Order which had provisions regarding deployment. To that extent, the trial court erred in its interpretation of the statute.[14] We therefore reverse the order as to the denial of limited contact as to

14. The trial court's statements in open court support this interpretation. When Father's counsel asked for clarification as to the denial of limited contact with Jay, the trial court stated "I am finding that his prior order is binding because I'm not finding that

Jay and remand for entry of an order addressing limited contact. If the trial court determines that Jay does *not* have a "close and substantial relationship" with Stepmother or his step and half siblings, or if it determines that limited contact would be *contrary* to his best interests, the trial court may enter a new order denying Father's request for limited contact. Since the trial court did not make these specific findings or conclusions based upon its interpretation of Jay's order and North Carolina General Statute § 50A-373(1), the trial court should do so on remand. In addition, the trial court may in its discretion receive additional evidence limited to this issue on remand. If the trial court orders limited contact on remand, after making appropriate findings of fact, it may set the schedule for the limited contact in its discretion and is neither required nor prohibited from following either the schedule granted to Father in Jay's order or the same limited contact schedule as granted for Elizabeth. The trial court may consider Jay's age and needs as well has his, Mother's, and Stepmother's schedules, and any other factors relevant to establishing the times for limited contact with Stepmother.

VII. Time Limit

[9] Father's last argument raises a procedural issue. He argues the trial court erred by limiting each side to 20 minutes for presentation of their evidence and arguments, and "[t]his amount of time was insufficient for the Plaintiff-Appellant to open, submit evidence with more than one witness, cross-examine the Defendant-Appellee, and close in this hearing." However, as Mother points out, Father's counsel did not object to the time limitations or request additional time before the trial court. She also notes that Father did not use all of the 20 minutes allotted to him, nor did he attempt to offer affidavits or other documentary evidence in addition to Stepmother's testimony.

"[T]he manner of the presentation of evidence is a matter resting primarily within the discretion of the trial judge, and his control of the case will not be disturbed absent a manifest abuse of discretion." *Wolgin v. Wolgin*, 217 N.C. App. 278, 283, 719 S.E.2d 196, 199 (2011) (quoting *State v. Harris*, 315 N.C. 556, 562, 340 S.E.2d 383, 387 (1986)) (affirming denial of appellant's motion for a new trial where the trial court limited the presentation of evidence when "(1) the length of the trial was

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circumstances require the modification of that, and therefore I cannot change that order. That does not prohibit [Mother] from allowing [Jay] to go. It's just that there is a prior order that is specifically talking about the custodial responsibility of the child in the event of deployment, and I'm finding that that is binding on this court, and I'm not going to change it."

discussed at pre-trial conferences and both parties agreed to a two-day trial; (2) the court made inquiry concerning the ability of both parties to present evidence within a two-day time frame and neither party objected during pre-trial conferences; (3) the court made several references to the time constrictions during the trial; and (4) at the close of Defendant's evidence, Defendant made no objection to time limits enforced by the trial court on the second day of trial"). We also note that this hearing was held on an expedited basis for purposes of entering a temporary order, and the trial court may take these factors into account when setting time limits for the hearing. Because Father did not make a timely request for additional time for presentation of his case prior to or during the hearing, this issue is deemed abandoned and cannot be raised for the first time on appeal. N.C. R. App. P. 10(a)(1).

VIII. Conclusion

We affirm the trial court's order as to Elizabeth, but we remand for the trial court to add Stepmother as a party to this action "until the grant of limited contact is terminated" under North Carolina General Statute § 50A-375(b) and to enter an order granting limited contact with Jay to Stepmother, *unless* the trial court determines that Jay does not have a "close and substantial relationship" with Stepmother or that limited contact would be contrary to his best interests. The trial court may in its sole discretion receive evidence on remand relevant to this determination only or it may enter an order based upon the current record.

AFFIRMED IN PART AND REMANDED.

Judges HAMPSON and YOUNG concur.

STATE OF NORTH CAROLINA, ON RELATION OF CITY OF ALBEMARLE, PLAINTIFF
v.
CHUCKY L. NANCE, JENNIFER R. NANCE, CHARLENE SMITH, MANAGER, NANCY DRY, JAMES A. PHILLIPS, TRUSTEE, FIRST BANK, LENDER, AND KIRSTEN FOYLES, TRUSTEE, DEFENDANTS

No. COA18-916

Filed 16 July 2019

1. Nuisance—public—hotel—manager—employment already terminated —failure to state a claim

A city failed to state a claim for relief pursuant to Civil Procedure Rule 12(b)(6) where its complaint prayed that defendant Smith, who was the manager of a "hotel" that was a hotbed of criminal activity, would no longer be allowed to operate or maintain a public nuisance on the hotel property. At the time the city brought the claim, defendant Smith's employment or tenancy had already been terminated and the hotel had closed.

2. Cities and Towns—initiation of legal action—through outside counsel—standing—applicable statutes and ordinances

A city lacked standing to bring a public nuisance action against operators of a "hotel" where the city failed to follow the requirements of the applicable statutes and ordinances requiring that it adopt a resolution in order to bring suit through outside counsel. The trial court properly concluded that it lacked subject matter jurisdiction over the action.

Appeal by plaintiff from order entered 30 October 2017 by Judge Lori Hamilton and orders entered 11 May 2018 and 29 May 2018 by Judge Julia L. Gullett in Stanly County Superior Court. Heard in the Court of Appeals 5 June 2019.

Cranfill Sumner & Hartzog LLP, by Carl Newman and Janelle Lyons, for plaintiff-appellant.

Bowling Law Firm, PLLC, by Kirk L. Bowling and Mark T. Lowder, for defendant-appellees Chucky L. Nance and Jennifer R. Nance.

John W. Webster for defendant-appellee Charlene Smith.

TYSON, Judge.

The City of Albemarle (the "City") appeals from orders of the trial court, which allowed Defendants' motions to compel discovery and granted Chucky L. Nance's, Jennifer R. Nance's ("the Nances"), and Charlene Smith's ("Smith") motions to dismiss. We affirm.

I. Background

The Nances have owned the subject property in Albemarle since 2012. A business known as the "Heart of Albemarle Hotel" operated on the property until April 2017. From January 2014 through April 2017, three years and four months, Albemarle police officers allegedly visited the areas near the subject property seventy-nine times in response to complaints of criminal activity, including assaults, sales of narcotics, and solicitation of prostitution.

On 24 March 2017, Albemarle's Chief of Police R.D. Bowen sent letters to the Nances, Kirsten Foyles, Nancy Dry, and James A. Phillips, Jr., giving notice to the parties, asserting the subject property was being used illegally under the nuisance statute, and demanding the nuisance be abated within 45 days. No notice letter was sent to Defendant Smith.

The City's purported outside counsel filed a complaint against the Nances, Smith, First Bank, Foyles, Dry, and Phillips on 4 August 2017, four months after the hotel had closed and all activities had ceased. The City alleged the Nances' use of real property constitutes a public nuisance pursuant to N.C. Gen. Stat. §§ 19-1 and 19-2. The City also alleged Smith was employed as a manager of the subject hotel but "Nance has fired Charlene Smith as the manager of the Property, but has placed her at [another hotel owned by the Nances] as the acting manager, overseeing day-to-day operations."

The Nances responded they had complied with the City's notice letter, fired Smith, evicted all patrons and tenants of the subject property, closed the hotel by 21 April 2017 and filed their answer. The Nances alleged they had notified City Manager Michael Ferris that all patrons and tenants had been evicted in April 2017 and the property was and has remained closed since that time.

Smith filed her answer and alleged she had "vacated the subject property on or about April 20, 2017 at the request of Defendant Chucky Nance when the business thereon ceased operation."

Foyles and First Bank filed a motion to dismiss, which was granted by the trial court in an order filed 13 November 2017. The City voluntarily dismissed the claims against Dry and Phillips, with prejudice, on

26 October 2017. None of those orders, actions, or dismissed parties are before us on appeal and judgments thereon are final.

Smith moved to dismiss the City's claims against her pursuant to N.C. R. Civ. P. 12(b)(6) as part of her answer. Smith argued, in part, that the City's complaint was insufficient, where it alleged she had been employed by the Nances and no allegation of her ownership existed to make her a real party in interest. The trial court heard and granted Smith's motion to dismiss with prejudice.

The Nances also filed a motion to dismiss the City's claims for lack of subject matter jurisdiction. The trial court heard the Nances' motion to dismiss, wherein they argued N.C. Gen. Stat. § 160A-12 required the city council to have passed a resolution authorizing the filing of the complaint. *See* N.C. Gen. Stat. § 160A-12 (2017). The City conceded, and the trial court found as fact, that no such resolution had been presented to, heard, or adopted by the council.

The trial court entered an order granting the Nances' motion to dismiss, which states, in relevant part:

> 1. N.C. General Statutes 19-2.1 grants authority to "the Attorney General, district attorney, county, municipality, or any private citizen of the county" to bring a civil action in the name of the State of North Carolina to abate a nuisance. This section specifies how a case must proceed.
>
> 2. N.C. General Statutes 160A-11 sets out and describes the corporate powers of cities and towns as follows:
>
> The inhabitants of each city heretofore or hereafter incorporated by act of the General Assembly or by the Municipal Board of Control shall be and remain *a municipal corporation* by the name specified in the city charter. Under that name they shall be vested with all of the property and rights in property belonging to the corporation; shall have perpetual succession; *may sue and be sued*; may contract and be contracted with; may acquire and hold any property, real and personal, devised, sold, or in any manner conveyed, dedicated to, or otherwise acquired by them, and from time to time may hold, invest, sell, or dispose of the same; may have a common seal and alter and renew the same at will; and *shall have and may exercise in conformity with the city charter and the general laws of this State all municipal*

> *powers*, functions, rights, privileges, and immunities of every name and nature whatsoever.
>
> 3. N.C. General Statutes 160A-12 specifies how the powers of municipalities are to be carried into action:
>
> *All powers*, functions, rights, privileges, and immunities of the corporation *shall be exercised by the city council* and carried into execution as provided by the charter or the general law. A *power*, function, right, privilege, or immunity that is conferred or imposed by charter or general law without directions or restrictions as to how it is to be *exercised or performed shall be carried* into execution *as provided by ordinance or resolution of the city council.*
>
> 4. Plaintiff, through Plaintiff's counsel, has been candid that no vote was taken by the Albemarle City Council that would authorize the filing of the lawsuit against these defendants and that *the City Council assumed this would be a law enforcement function.*
>
> 5. As a result, this Court cannot find that the City has vested subject matter jurisdiction with this Court, and pursuant to statute the Court has no other alternative than to dismiss this action. (Emphasis supplied)

The City timely appealed from the trial court's order granting the Nances' and Smith's respective motions to dismiss.

II. Jurisdiction

An appeal of right lies to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Standard of Review

All issues in this appeal are reviewed *de novo*. "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 457 N.C. 567, 597 S.E.2d 673 (2003).

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy,* 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted). "Issues of statutory construction are questions of law, reviewed *de novo* on appeal." *Id.* (citation omitted).

IV. Analysis

A. Dismissal of Appeal of Motion to Compel

The City gave notice that it was appealing the order granting the Nances' motion to compel entered 30 October 2017. "The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28(a). Where a party "does not set forth any legal argument or citation to authority to support [the] contention, [it is] deemed abandoned." *State v. Evans*, __ N.C. App. __, __, 795 S.E.2d 444, 455 (2017). This issue was not addressed in the City's appellate brief and it has abandoned this issue. The trial court's order entered 30 October 2017 is final.

B. Smith's Motion to Dismiss

[1] Upon appellate review of the trial court's dismissal under Rule 12(b)(6) for failure to state a claim:

> [W]e determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. In ruling upon such a motion, the complaint is to be liberally construed. Dismissal is warranted if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim.

State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010) (citations omitted).

To determine whether the City asserted a claim upon which relief can be granted, we review the original complaint in the light most favorable to the non-moving party. All allegations therein are taken as true. *Id.*

The complaint alleges Smith "oversaw the day-to-day operations at the Heart of Albemarle" and that Smith was "fired . . . as the manager," but was placed at another hotel as acting manager. No other hotel of the Nances is a part of or a party to this litigation.

Smith's employment or tenancy at the Heart of Albemarle Hotel was allegedly terminated by 20 April 2017, and she was ordered to and did vacate the premises entirely. The City waited until 4 August 2017 to file the complaint.

N.C. Gen. Stat. § 19-1(a) provides that "[t]he erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of alcoholic beverages, illegal possession or sale of controlled substances . . . shall constitute a nuisance." N.C. Gen. Stat. § 19-1(a) (2017). At the time the City brought the claim, Smith's employment or tenancy had already been terminated and all activities and tenancies at the Heart of Albemarle Hotel had ceased.

The City argues the statute provides that "[t]he abatement of a nuisance does not prejudice the right of any person to recover damages from its past existence." N.C. Gen. Stat. § 19-1.5 (2017). This assertion is irrelevant, as the City did not serve Smith with any notice of the alleged public nuisance and does not request damages against Smith in the complaint. In its complaint, the City prayed that "Defendants Chucky L. Nance, Jennifer Nance, Charlene Smith and their agents" no longer be allowed to operate or maintain a public nuisance on the property or within the state of North Carolina. Smith was no longer employed by nor a tenant or leasee of the Nances, was not present at the hotel, and was a private citizen when Plaintiff brought its claim.

Smith cannot possibly provide any relief that Plaintiff sought. We affirm the trial court's order to dismiss the complaint against Smith under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiff's arguments are overruled.

C. Subject Matter Jurisdiction

[2] The City asserts the trial court erred in granting the Nances' motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). The Nances contend the trial court properly found and concluded the City lacked standing to initiate the legal action. They argue the City did not invoke the trial court's subject matter jurisdiction, because the city council did not hold a vote and resolve to commence legal proceedings. We agree.

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2017). The party bringing the action has the burden of proving standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 364 (1992); *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002).

The elements of standing are "an indispensable part of the plaintiff's case, each element must be supported in the same way as any other

matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561, 119 L. Ed. 2d at 364. Questions of standing are properly addressed in Rule 12(b)(1) motions to dismiss. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

"Standing refers to 'a party's right to have a court decide the merits of a dispute.' To have standing to bring a claim, one must be a 'real party in interest,' which typically means the person or entity against whom the actions complained of were taken." *WLAE, LLC v. Edwards*, __ N.C. App. __, __, 809 S.E.2d 176, 181 (2017) (citations omitted).

"If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Woodring v. Swieter*, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006) (quoting *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005) (internal quotation marks omitted)).

"Wherever a nuisance is kept, maintained, or exists, as defined in this Article, the *Attorney General, district attorney, county, municipality, or any private citizen of the county* may maintain a civil action in the name of the State of North Carolina to abate a nuisance." N.C. Gen. Stat. § 19-2.1 (2017) (emphasis supplied).

Cities may exercise the powers delegated to them by the General Assembly issuing a city charter and are operated as municipal corporations. N.C. Gen. Stat. §§ 160A-11, 160A-12 (2017). As municipal corporations, cities are required to exercise these powers as are delegated and provided in statutes by ordinance or resolution of the city council. *Id.*

Albemarle's adopted ordinances set out the duty of the city attorney to "prosecute and defend suits against the City." The ordinances also provide that the "*Council may employ other legal counsel* from time to time, in addition to the City Attorney, as may be necessary to handle adequately the legal affairs of the City." City of Albemarle, N.C., Code of Ordinances, Art. IV, § 4.3 (emphasis supplied).

The City contends it has standing because it was damaged through the repeated visits of police officers to the Heart of Albemarle Hotel. The City asserts "public nuisance actions are *qui tam* actions, whereby essentially anyone can file suit to end the nuisance." The City also asserts the fact that it retained an attorney to file the suit is sufficient to show that the suit was filed by an agent of the City, as verified by the chief of police, which meets the requirements of N.C. Gen. Stat. § 19-2.1.

The City additionally asserts the exercise of municipal powers must be performed consistent with the city charter, and since the charter allows the city council to hire other legal counsel "as may be necessary to handle adequately the legal affairs of the City," its hiring outside counsel to file the suit was in compliance with the ordinance, and meets the requirements of N.C. Gen. Stat §§ 19-2.1, 160A-11, 160A-12.

The Nances do not contest the statutes and the City's charter allow the City to file and maintain a civil action for a public nuisance. They argue the city council did not vote and resolve to exercise its authority in this action. Without the city council's ordinance or resolution, the Nances argue the City has produced no evidence to show that the formal process to file suit was initiated, approved, or resolved by the city council. We agree.

It is undisputed, and the trial court found, that no notice, meeting, minutes, or vote of the city council was resolved, given, or taken to initiate a public nuisance action against the Nances. The City's private counsel asserted before the trial court that the city council had "discussed the case" and "assumed" the proper action would be taken by the State Bureau of Investigation ["SBI"] and chief of police "to let them follow through with whatever they thought was best to do," and to maintain it as a criminal proceeding, as it is common practice in other cities and counties to "just file[] a Chapter 19."

The notice letter seeking to abate the alleged public nuisance did not come from one of the entities or public individuals on N.C. Gen. Stat. § 19-2.1's enumerated list of those empowered or authorized to bring and maintain a public nuisance abatement action: "the Attorney General, district attorney, county, municipality, or any private citizen of the county."

The City's police chief signed the notice letter. Contrary to the council's assumption, neither the SBI nor the chief of police is included in this list to initiate a civil public nuisance action. Further, nothing in the record indicates the letter was drafted by any party that could have maintained such an action. Even if Chief Bowen had been acting as a private citizen of the county, no evidence in the record shows a bond being posted, as is required when a private citizen initiates the action. N.C. Gen. Stat § 19-2.1.

The civil action was not properly initiated by the city council. It was discussed by the council and letter notice was initiated by the chief of police, without any reference to being drafted by or on behalf of the city attorney or outside counsel for the City. Albemarle's ordinances require that either the city attorney or outside counsel selected by the council

prosecute this action. In order to bring suit through outside counsel, the city council must adopt a resolution. City of Albemarle, N.C., Code of Ordinances, Art. IV, § 4.3; N.C. Gen. Stat. § 160A-12. The city council was on notice of this requirement, yet no evidence of compliance has been produced. The city attorney's signature or joinder to this action after it was initiated does not appear on any of the pleadings or documents.

While the City's outside counsel asserted at oral argument that both he and previous trial counsel were hired pursuant to a resolution of the city council, no evidence of this authority exists in the record. Without such evidence, the council's discussion, assumptions, and common practice do not convey nor carry their burden to prove standing. *Neuse River Found. Inc.*, 155 N.C. App. at 113, 574 S.E.2d at 51.

"The [city council] never attempted to obtain nor received the required . . . vote prior to filing this [civil] action. Without the required vote, the [council] lacked the authority to commence legal proceedings against [the Nances] and does not possess standing." *Peninsula Prop. Owners Ass'n, Inc. v. Crescent Res., LLC*, 171 N.C. App. 89, 97, 614 S.E.2d 351, 356 (2005).

Albemarle's ordinances define the proper party to initiate an action for the city. "[B]y enacting [such an] ordinance, the [council] must follow the procedures it has set therein. If such procedures are inconvenient, the [council] should change them, not ignore them." *Town of Kenansville v. Summerlin*, 70 N.C. App. 601, 602, 320 S.E.2d 428, 430 (1984) (citation omitted).

The City must follow the requirements of the statutes and charter, and the ordinances and procedures it established. Here, it has failed to do so. *Id.* The City's arguments are overruled. The trial court's order is affirmed.

V. Conclusion

The City failed to argue or present any authority concerning its appeal of the order granting of the Nance's motion to compel discovery. Where a party "does not set forth any legal argument or citation to authority to support [the] contention [it is] deemed abandoned." *Evans*, __ N.C. App. at __, 795 S.E.2d at 445. This issue was not addressed in the City's brief and is abandoned. N.C. R. App. P. 28(a).

The City fails to state a claim upon which relief can be granted against Smith. N.C. R. Civ. P. 12(b)(6). Smith never received notice of any violations or to abate any nuisance. At the time the complaint was made, Smith was no longer employed by the Nances nor was a tenant

of the Heart of Albemarle Hotel property. The City failed to demand any relief that could be granted after Smith no longer worked at or occupied the hotel property.

The City failed to properly initiate a public nuisance action against the Nances. The City failed to follow the requirements of the statutes and ordinances in effect or to provide evidence of outside counsel's authority to file suit on its behalf. *Town of Kenansville*, 70 N.C. App. at 602, 320 S.E.2d at 430. The trial court properly concluded it lacked subject matter jurisdiction to address the City's claims against the Nances. *Peninsula*, 171 N.C. App. at 97, 614 S.E.2d at 356.

The trial court's orders compelling discovery and dismissing the City's claims are affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and YOUNG concur.

STATE OF NORTH CAROLINA
v.
ADAM RICHARD CAREY

No. COA18-1233

Filed 16 July 2019

1. Appeal and Error—abandonment of issues—lack of argument

Pursuant to Rule of Appellate Procedure 28(a), defendant abandoned any issue pertaining to his conviction for impersonating a law enforcement officer where he failed to raise any argument on appeal.

2. Firearms and Other Weapons—weapon of mass destruction—N.C.G.S. § 14-288.8—flash bang grenade

The State did not present sufficient evidence that defendant possessed a weapon of mass death and destruction in violation of N.C.G.S. § 14-288.8(c) where multiple "flash bang" grenades were found in defendant's car, because those devices did not fit the definition of or qualify as the type of grenade listed in the statute.

Judge YOUNG concurring in part and dissenting in part.

STATE v. CAREY

[266 N.C. App. 362 (2019)]

Appeal by defendant from judgment entered 18 May 2018 by Judge Leonard L. Wiggins in Onslow County Superior Court. Heard in the Court of Appeals 5 June 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General E. Burke Haywood, for the State.

Guy J. Loranger, for defendant-appellant.

TYSON, Judge.

Adam Richard Cary ("Defendant") appeals from judgments entered upon a jury's verdict finding him guilty of one count each of possession of a weapon of mass death and destruction and impersonation of a law enforcement officer. We find no error in Defendant's conviction for impersonation of a law enforcement officer, reverse his conviction for possession of a weapon of mass death and destruction, and remand for resentencing.

I. Background

Defendant was operating a dark-colored Dodge Charger and pulled over a speeding vehicle on 16 July 2016. Defendant had "emergency lights" flashing on his car. State Highway Patrol Trooper Cross pulled behind Defendant's vehicle and noticed the registration plate was not consistent with or issued to a law enforcement agency. After further investigation, Defendant was arrested, and his car was searched incident to arrest. Officers found a medical technician badge, firearms, magazines, ammunition, suppressors, three diversionary flash bang grenades, and other items located inside of Defendant's car. Defendant was indicted on three counts of possession of weapons of mass destruction, impersonating a law enforcement officer, following too closely, and speeding.

On 15 May 2018, the State dismissed two counts of possession of firearms as weapons of mass death and destruction, following too closely, and speeding. After trial on 18 May 2018, a jury returned verdicts finding Defendant guilty of one count of possession of a weapon of mass death and destruction and impersonation of a law enforcement officer. For the conviction of possession of a weapon of mass death and destruction charge, the court ordered Defendant to serve a term of 16 to 29 months. The court suspended the sentence and imposed intermediate punishment, ordering Defendant to serve an active term of 120 days and placing him on supervised probation for a period of 24 months. For the

conviction on the charge of impersonating a law enforcement officer, the court ordered Defendant serve a term of 45 days. The court suspended the sentence and imposed community punishment, placing Defendant on supervised probation for a period of 24 months. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court from a final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court erred by denying his motion to dismiss the weapon of mass death and destruction charge. Defendant also contends the trial court committed plain error by: (1) failing to instruct the jury on the definition of "weapon of mass death and destruction;" and (2) instructing the jury that it could find that the State satisfied the "weapon of mass death and destruction" element when the indictment did not allege that theory of guilt.

IV. Impersonation of a Law Enforcement Officer

[1] Defendant appealed all of his convictions, including impersonating a law enforcement officer. On appeal, Defendant raises no arguments to challenge or show error in this conviction. Defendant's failure to bring forth arguments and authority results in abandonment of his appeal of this conviction. N.C. R. App. P. 28(a). We find no error in Defendant's conviction of impersonating a law enforcement officer.

V. Standard of Review

This Court reviews questions of statutory construction *de novo*. *In re Ivey*, __ N.C. App. __, __, 810 S.E.2d 740, 744 (2018) (citation omitted).

VI. Motion to Dismiss

[2] Defendant contends the trial court erred by denying his motion to dismiss the possession of a weapon of mass death and destruction charge for insufficient evidence. He argues possession of flash bang grenades falls outside of the category of "Grenade" listed as a "weapon of mass death and destruction" set forth in N.C. Gen. Stat. § 14-288.8(c). We agree and reverse Defendant's conviction of possession of a weapon of mass death and destruction.

A. "Weapon of Mass Death and Destruction"

Defendant was charged with one count of possession of a weapon of mass death and destruction under N.C. Gen. Stat. 14-288.8(c). We must consider the provisions and language contained within the statute in order to determine whether or not a flash bang device would qualify as a weapon of mass death and destruction. While a "grenade" may qualify as a "weapon" under *State v. Sherrod*, a flash bang grenade is neither a deadly weapon nor a weapon of mass death and destruction. *State v. Sherrod*, 191 N.C. App. 776, 781, 663 S.E.2d 470, 474 (2008) (defining weapon as "an instrument of attack or defense in combat, . . . or an instrument of offensive or defensive combat[;] something to fight with[;] something (as a club, sword, gun, or grenade) used in destroying, defeating, or physically injuring an enemy" (citation omitted)). Viewing the statute holistically and narrowly, the flash bang grenades found in Defendant's car do not fit within the definition of a weapon of mass death and destruction in N.C. Gen. Stat. § 14-288.8(c).

B. Ejusdem Generis

When appellate courts review and construe the meanings of words and phrases the General Assembly listed within a statute, the legislative intent is presumed to pair and restrict the meaning and application of broad and generic words to the specific context or stated purpose of the statute.

> "[T]he *ejusdem generis* rule is that where general words *follow* a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated."

State v. Fenner, 263 N.C. 694, 697-98, 140 S.E.2d 349, 352 (1965). This principle "does not warrant the court subverting or defeating the legislative will." *Id.* at 698, 140 S.E.2d at 352.

Following this canon of statutory construction, possession of a "flash bang grenade," even though called a "grenade," does not fit the definition nor qualify as the type of "Grenade" that is enumerated in N.C. Gen. Stat. § 14-288.8(c)(1) as a weapon of mass death and destruction. The other items included in the list, such as a "Bomb," "Rocket having a propellant charge of more than four ounces," "Missile having an explosive or incendiary charge of more than one-quarter ounce," and "Mine," comprise a set of highly deadly and destructive fragmentary and

incendiary explosives capable of causing mass deaths and destruction. They are dissimilar to and unlike the flash bang "grenades" found inside of Defendant's car.

The admitted evidence, viewed in the light most favorable to the State, shows flash bang grenades do not fall within the category of restricted items capable of producing mass death and destruction as are regulated under the statute. *Id.* Trooper Cross testified that to deploy a flash bang grenade, the user would "[h]old the long lever, the spoon, pull the pin out . . . you would roll it into a room . . . and it would make a bright flash and a very loud bang for the purpose of rendering the people—or whoever is in that room—stunned, disabled, disoriented[.]"

This testimony of the effects of "a bright flash and a very loud bang" upon use is wholly inconsistent with the types and categories of egregious devices and weapons of mass death and destruction regulated or prohibited under N.C. Gen. Stat. § 14-288.8(c)(1). The statute regulating weapons of mass death and destruction prohibits the unlicensed or unauthorized possession of a class of weapons of munitions of war that are capable of and can result in widespread and catastrophic deaths and destruction of property. The State produced no evidence that the items recovered from Defendant's vehicle were intended to be included within this statute or capable of rendering those results.

"[T]he *ejusdem generis* rule is that where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated." *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970). A flash bang grenade is not classified or defined even as a deadly weapon to individuals or multiple persons, as with a knife, gun, pistol, rifle, or shotgun, and does not fit into the greater and more restricted category of weapons of mass death or destruction.

To be defined and included as a weapon of mass death or destruction, the item must be capable of causing catastrophic damage and consistent with the highly deadly and destructive nature of the other enumerated items in the list contained in N.C. Gen. Stat. § 14-288.8(c). *Id.* The flash bang grenades found inside of Defendant's vehicle are not consistent with the purpose, do not fit within, and do not rise to the potential impacts of enumerated general items within the list as constrained by the intent and purpose of the statute. *Id.* The State's argument is overruled.

C. Exclusions from the Statute

N.C. Gen. Stat. § 14-288.8(c) contains the express provision that the "term 'weapon of mass death and destruction' does not include any device which is neither designed nor redesigned for use as a weapon." Defendant specifically requested a jury instruction on this exception under N.C. Gen. Stat. § 14-288.8(c), which the trial court denied.

When describing how he had used flash bang grenades while serving on active military duty in Iraq, Trooper Cross stated that "we could surprise, stun and get the upper hand so we could do what we had to do quickly." Flash bang grenades were not used as a weapon of mass death or destruction, but were deployed for surprise, disorientation, and diversionary purposes, uses clearly outside of the purpose, scope, and prohibitions of the statute.

It is overly simplistic and erroneous to classify a flash bang with "a bright flash and a very loud bang" or a smoke grenade emitting fog as a "Grenade" as a weapon of mass death and destruction. This inclusion would equate to classifying a cherry bomb as a "Bomb" or a bottle rocket as a "Rocket" capable of causing mass deaths. *See Sherrod*, 191 N.C. App. at 781, 663 S.E.2d at 474. No admitted evidence shows these flash bang devices are capable of being used as a weapon to cause mass deaths or widespread destruction.

D. Rule of Lenity

The rule of lenity may apply if there is ambiguity within the statute. The trial court's preemptive interpretation of N.C. Gen. Stat. § 14-288.8(c)(1) is overly broad. The rule of lenity requires courts to read criminal statues narrowly and restrictively. As here, the statute's general and undefined terms could include possession of items within its provisions, which are neither dangerous nor deadly weapons, and yet be included and sanctioned as a weapon of mass death and destruction.

Because of the broad, general terms included, the ambiguity in what items are included within the proscribed list in N.C. Gen. Stat. § 14-288.8(c)(1) compels the rule of lenity to be applicable here. *See State v. Heavner*, 227 N.C. App. 139, 144, 741 S.E.2d 897, 901 (2013); *State v. Crawford*, 167 N.C. App. 777, 780, 606 S.E.2d 375, 378 (2005) ("The rule of lenity applies only when the applicable criminal statute is ambiguous.").

The rule of lenity "forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention." *State v. Wiggins*, 210 N.C.

App. 128, 133, 707 S.E.2d 664, 669, *cert. denied*, 365 N.C. 189, 707 S.E.2d 242 (2011) (quotation omitted). "[W]hen applicable, the rule of lenity requires that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Heavner*, 227 N.C. App. at 144, 741 S.E.2d at 901-02 (quotation and citation omitted).

Based upon the application of the rule of lenity to the intent and types of weapons proscribed by the statute, Defendant's motion to dismiss the charge of possession of a weapon of mass death and destruction should have been granted. The flash bang grenades found in Defendant's car were not devices or weapons or "Grenades" capable of causing mass death and destruction when construing N.C. Gen. Stat. § 14-288.8(c)(1) narrowly under the rule of lenity. *Id.*

VII. Plain Error in the Jury Instructions

Defendant also asserts the trial court committed plain error both by failing to instruct the jury on the definition of weapon of mass death or destruction and by preemptively instructing the jury that the State had satisfied the possession of a weapon of mass death and destruction element, if it found that Mr. Carey had possessed a "grenade" where the indictment did not allege that theory of guilt. Since we reverse Defendant's conviction for possession of a weapon of mass death and destruction because the trial court should have granted Defendant's motion to dismiss for the reasons analyzed above, we do not address Defendant's arguments challenging the jury instructions regarding these issues.

VIII. Conclusion

Defendant's failure to bring forth arguments and authority results in abandonment of the appeal of his conviction for impersonating a law enforcement officer. N. C. R. App. P. Rule 28(a). We find no error in that conviction.

The trial court erred by failing to grant Defendant's motion to dismiss. The flash bang grenades found in the back of Defendant's vehicle do not satisfy the requirements for possession of a "Grenade" that is a "weapon of mass death and destruction" as is set out by N.C. Gen. Stat. § 14-288.8(c). These items are not "of the same kind, character and nature as those [weapons] specifically enumerated by the statute." *Fenner* at 697-98, 140 S.E.2d at 352.

The trial court increased the potential penalty on Defendant by construing the scope of the statute's undefined and general words ambiguously, beyond the General Assembly's intention, and inconsistent with

the well-established canons of statutory construction. *See Wiggins*, 210 N.C. App. at 133, 707 S.E.2d at 669.

The State failed to present sufficient evidence under N.C. Gen. Stat. 14-288.8(c) to support a conclusion or verdict that possession of the flash bang grenades found in Defendant's car were a "Grenade" proscribed as a weapon of mass death and destruction. Defendant's motion to dismiss is properly allowed.

We reverse the trial court's decision and remand for resentencing. This decision does not prevent nor prohibit the possession or use of flash bang grenades from being otherwise restricted or regulated by law. *It is so ordered.*

NO ERROR IN PART; REVERSED IN PART; AND REMANDED.

Judge MURPHY concurs.

Judge YOUNG concurs in part and dissents in part with separate opinion.

YOUNG, Judge, dissenting in part and concurring in part.

I. Introduction

The majority has held that flash bang grenades are not weapons of mass death and destruction under N.C. Gen. Stat. § 14-288.8(c) (2017). Accordingly, the majority held that the trial court erred by denying Defendant's motion to dismiss the charge of possession of a weapon of mass death and destruction for insufficient evidence and reversed the conviction. Because I disagree with the underlying principle, I must respectfully dissent.

The majority held that a "flash bang grenade," even though called a "grenade," does not fit the definition nor qualify as the type of "Grenade" that is enumerated in N.C. Gen. Stat. § 14-288.8(c)(1). Following the canons of statutory construction, the plain language of the statute should control. *State v. Jamison*, 234 N.C. App. 231, 238, 758 S.E.2d 666, 671 (2014).

> The intent of the Legislature controls the interpretation of a statute. When a statute is unambiguous, the court will give effect to the plain meaning of the words without resorting to judicial construction. Courts must give an unambiguous statute its plain and definite meaning, and

> are without power to interpolate, or superimpose, provisions and limitations not contained therein.

Id. at 238, 758 S.E.2d at 671.

II. Motion to Dismiss

"[T]o obtain a conviction for possession of a weapon of mass death and destruction, the State must prove two elements beyond a reasonable doubt: (1) that the weapon is a weapon of mass death and destruction and (2) that defendant knowingly possessed the weapon." *State v. Billinger*, 213 N.C. App. 249, 253, 714 S.E.2d 201, 205 (2011). Defendant only challenges element one. By statute, "the term 'weapon of mass death and destruction' includes: Any explosive or incendiary: (a) Bomb; or (b) Grenade; or . . . (f) Device similar to any of the devices described above." N.C. Gen. Stat. § 14-288.8(c)(1).

Defendant contends that the grenades in his possession are excluded from the definition of weapons of mass death and destruction. However, the statute does not support his argument.

> The term "weapon of mass death and destruction" does not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of Title 10 of the United States; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting purposes, in accordance with Chapter 44 of Title 18 of the United States Code.

N.C. Gen. Stat. § 14-288.8(c).

In *Sherrod*, this Court held "an instrument of attack or defense in combat, . . . or an instrument of offensive or defensive combat[;] something to fight with[;] something (as a club, sword, gun, or grenade) used in destroying, defeating, or physically injuring an enemy" is a weapon. *State v. Sherrod*, 191 N.C. App. 776, 781, 663 S.E.2d 470, 474 (2008). In the present case, the weapon at issue is a grenade. Diversionary grenades are military-issued ordnance which are used in combat. Furthermore, in the present case, the words: "GRENADE, HAND, DIVERSIONARY" and "IF FOUND DO NOT HANDLE NOTIFY POLICE OR MILITARY,"

were printed on the labels of the grenades found in Defendant's vehicle. Trooper Christopher Cross, who served in the military for sixteen years and used a flash bang grenade, testified that flash bang grenades "have the ability to cause serious injury, such as loss of limbs, burns, and things like that."

The flash bang grenade at issue was designed to be used in combat as a weapon. Moreover, the flash bang grenade was not "redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device." Lastly, there is no evidence to show that the flash bang grenade was "surplus ordnance sold, loaned, or given by the Secretary of the Army," nor was it an "antique" or used solely for "sporting purposes." As such, the flash bang grenade is not excluded from being a weapon of mass death and destruction as enumerated in N.C. Gen. Stat. § 14-288.8(c).

Pursuant to the plain language of the statute, a "flash bang grenade" is, by law, a "grenade," and therefore a weapon of mass death and destruction. Furthermore, a "flash bang grenade" does not fall within an exclusion enumerated in N.C. Gen. Stat. § 14-288.8(c). There was sufficient evidence to support a finding that Defendant possessed a weapon of mass death and destruction.

III. Failure to Provide Definition

Defendant alleges the trial court committed plain error by failing to instruct the jury on the definition of a "weapon of mass death or destruction" as provided in N.C. Gen. Stat. § 14-288.8(c)(1). Although the majority declined to address this issue, I believe it is properly before us. Defendant raised no objection at trial, and we therefore review for plain error.

Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

As in Defendant's first argument, this Court established in *Sherrod* that a grenade is a weapon "used in destroying, defeating, or physically injuring an enemy." *Sherodd*, 191 N.C. App. at 781, 663 S.E.2d at 474. In addition, the applicable statute defines a grenade as a "weapon of mass death and destruction," so there was no need for a definition to be provided. N.C. Gen. Stat. § 14-288.8(c)(1).

Even if it were error for the trial court to decline to instruct the jury on the definition of a "weapon of mass death or destruction," it would not rise to the level of prejudice to Defendant. The definition specifically includes grenades, and thus, the jury would probably have reached the same result. Therefore, I would find no plain error.

IV. Element not in Indictment

Defendant contends the trial court committed plain error by instructing the jury that it could find that the State satisfied the "weapon of mass death or destruction" element if it found that Defendant possessed a "grenade" where the indictment did not allege that theory of guilt. As above, although the majority declined to address this issue, I believe it is properly before us. Because this issue was not preserved by objection at trial we review for plain error.

The indictment alleged Defendant "did possess a weapon of mass death and destruction, three flash bang grenades." Defendant complained that the description of the grenade was too specific. A flash bang grenade was presented at trial even though it was only referred to as a "grenade."

In *Bollinger*, the defendant was indicted for carrying a concealed weapon. The indictment stated that the defendant "unlawfully and willfully did carry a concealed deadly weapon while off his premises, to wit: *a Metallic set of Knuckles*." *State v. Bollinger*, 192 N.C. App. 241, 243, 665 S.E.2d 136, 138 (2008) (emphasis in original). The trial court instructed the jury that "it could find defendant guilty only upon a finding that defendant 'intentionally carried and concealed about his person *one or more knives*." *Id.* at 244, 665 S.E.2d at 138 (emphasis in original). As in the instant case, the defendant argued that there was a fatal variance between the offense charged in the indictment and the evidence presented, and instructions given, at trial. This Court held that "an indictment is sufficient if it charges the substance of the offense, puts the defendant on notice of the crime, and alleges all essential elements of the crime." *Id.* at 246, 665 S.E.2d at 139. In *Bollinger*, the additional language, "to wit: *a Metallic set of Knuckles*" was deemed "mere surplusage and not an essential element of the crime of carrying a concealed weapon." *Id.* at 246, 665 S.E.2d at 139-140.

Similarly, in this case, it was unnecessary to say, "three flash bang grenades" instead of "grenades." It is clear that the offense is possession of a weapon of mass death and destruction. As a result, the indictment did allege that theory of guilt. However, even if it did not, the jury

would probably not have reached a different result in the absence of this instruction, and therefore, I would find no plain error.

V. Impersonating a Law Enforcement Officer

I agree with the majority that Defendant's failure to bring forth arguments and authority results in abandonment of his appeal of this conviction. N.C.R. App. P. Rule 28(a).

VI. Conclusion

With regard to impersonating a law enforcement officer, I concur with the majority that Defendant's argument is abandoned on appeal. However, with regard to the weapon of mass death and destruction, I respectfully dissent, and this Court should uphold the lower court's decision.

STATE OF NORTH CAROLINA
v.
TIMOTHY LAVAUN CRUMITIE

No. COA18-781

Filed 16 July 2019

1. Identification of Defendants—out-of-court identification—photograph—Eyewitness Identification Reform Act—not applicable

In a prosecution for murder and kidnapping (among other crimes), where defendant abducted and shot his ex-girlfriend after fatally shooting her boyfriend, the trial court properly admitted testimony from a police officer who saw a man running near the crime scene, obtained a description of defendant from the ex-girlfriend, and located a DMV photograph of defendant, whom he recognized as the man he had seen earlier. This out-of-court identification was neither a lineup nor a "show-up" under the Eyewitness Identification Reform Act (EIRA) and therefore could not be suppressed on the basis that the officer failed to follow EIRA procedures. Further, there was no evidence that the officer's viewing of the photograph was inherently suggestive or created a substantial likelihood of irreparable misidentification.

2. Constitutional Law—Confrontation Clause—expert testimony—report created by another expert

In a prosecution for murder and kidnapping (among other crimes), where defendant abducted and shot his ex-girlfriend after fatally shooting her boyfriend, the trial court did not violate the Confrontation Clause by allowing an FBI agent to give expert testimony about a cellular site analysis report created by another agent, who was unavailable to testify. In testifying about the use of cellphone data to locate defendant on the night of the alleged crimes, the expert gave his independent opinion based on his own peer review of the report, and defendant had ample opportunity to cross-examine the expert about that opinion and about the report itself.

Appeal by defendant from judgment entered 21 February 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne M. Middleton, for the State

Massengale & Ozer, by Marilyn G. Ozer for defendant-appellant.

BRYANT, Judge.

Where an identification by a law enforcement officer was not subject to the Eyewitness Identification Reform Act, we affirm the trial court's denial of defendant's motion to suppress. Where defendant was given an opportunity to cross-examine testifying expert witness about another expert's report, the trial court did not err in allowing the testimony into evidence.

In the early evening of 5 August 2016, defendant Timothy Lavaun Crumitie went to the apartment complex of his ex-girlfriend, Kimberly Cherry, and shot her boyfriend, Michael Gretsinger, twice in the head. Defendant abducted Cherry and took her to his house in Rowan County. He eventually took her back to a field near her apartment complex, shot her twice in the head, and dumped her in the trunk of the car. Cherry survived and escaped to call the police. Cherry had difficulty speaking, due to the bullets in her head causing hemorrhaging and trauma to the area that controls speech. After speaking with the police, Cherry was transported to the hospital and admitted to the intensive care unit. Gretsinger was rushed to the hospital for surgery. Although the surgery stabilized

Gretsinger, the doctors could not remove the bullets as they had passed through to the other side of his brain, and Gretsinger died nine days later.

Defendant was indicted on one count of attempted first-degree murder of Cherry, one count of attempted first-degree murder of Gretsinger, one count of possession of a firearm by a felon, one count of first-degree kidnapping, and one count of assault on a female. After Gretsinger was pronounced dead, defendant was indicted for murder and one count of first-degree burglary. The State did not seek the death penalty. Defendant filed a pre-trial motion to suppress identification testimony by Officer Bradley Potter of the Charlotte-Mecklenburg Police Department, who responded to Cherry's 911 call and observed defendant near Cherry's apartment.

The case was tried on 5 February 2018 in Mecklenburg County Superior Court before the Honorable Hugh B. Lewis, Judge presiding. Defendant filed a pre-trial motion to suppress and a hearing was held.

Officer Potter testified that he saw a man at Cherry's apartment when he responded to a shooting incident at her residence. The man ran into the breezeway of an adjacent building, and Officer Potter ran after him. Officer Potter testified that he thought, from the towel in the man's hands, the man was running to render aid to a gunshot victim. After he lost sight of the man, Officer Potter went to try and locate Cherry, who had sought refuge with people in another apartment. Cherry told Officer Potter that her boyfriend had been shot and described the suspect as a black male, fifty years old, and approximately 5'9" in height. Because Cherry was having difficulty communicating verbally, Officer Potter asked her to write down what she needed to tell him on his notepad. She wrote down defendant's name and her apartment number where officers soon found Gretsinger. Officer Potter accessed a DMV photograph of defendant, whom he identified as the same man he had seen running with a towel when he arrived at the scene. The trial court denied defendant's suppression motion and allowed Officer Potter to testify before the jury. At trial, the State called Officer Potter to testify about Cherry's 911 call, and over defendant's objections, the trial court allowed his testimony identifying defendant.

Special Agent Michael Sutton of the FBI's Cellular Analysis Survey Team ("CAST") was called to testify for the State as an expert in the field of historical cellular site analysis and cellular technology. Special Agent Warren, the FBI agent who analyzed the cellphone records of defendant and Cherry, was unavailable to testify at trial. The State moved to introduce Agent Warren's cell site analysis report through Agent Sutton. Defendant objected arguing the State had committed discovery

violations and that admission of the report would violate defendant's right to confront witnesses against him. The trial court excluded Agent Warren's report but allowed Agent Sutton to testify about the procedures of CAST, his review of the report, and his independent opinion about the testing.

Defendant was convicted[1] of first-degree murder of Gretsinger, first-degree kidnapping and attempted first-degree murder of Cherry, second-degree burglary, and possession of a firearm by a felon. The jury found defendant not guilty of assault on a female. Defendant received a mandatory life sentence for first-degree murder and separate sentences for the other convictions. Defendant gave notice of appeal in open court.

On appeal, defendant argues the trial court erred by: I) denying his motion to suppress eyewitness identification testimony, and II) allowing an expert witness to testify regarding a report created by an unavailable witness.

I

[1] Defendant first argues the trial court improperly denied his motion to suppress Officer Potter's eyewitness testimony. Specifically, defendant argues that Officer Potter failed to comply with "show-up" procedures, as set forth in the Eyewitness Identification Reform Act ("EIRA"). We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings[,] in turn[,] support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Conclusions of law are reviewed *de novo* and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

The EIRA, codified in N.C. Gen. Stat. § 15A-284.52, establishes standard procedures for law enforcement officers when conducting out-of-court eyewitness identifications of suspects. N.C. Gen. Stat. § 15A-284.52 (2017). There are three types of eyewitness identifications under the EIRA to identify the perpetrator of a crime: live lineups, photo lineups, and show-ups. Live lineups are "procedure[s] in which a group

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1. The attempted first-degree murder of Gretsinger was dismissed and the first-degree burglary indictment was later amended to second-degree burglary.

of people [are] displayed to an eyewitness[,]" whereas photo lineups are "procedure[s] in which an array of photographs [are] displayed to an eyewitness[.]" *Id.* § 15A-284.52(a)(6)–(7). Show-ups are "procedure[s] in which an eyewitness is presented with a single live suspect for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime." *Id.* § 15A-284.52(a)(8).

Here, the inadvertent out-of-court identification of defendant, based on a single DMV photograph accessed by an investigating officer, was neither a lineup or show-up under the EIRA, and thus not subject to those statutory procedures.

At the hearing, the trial court made the following factual findings:

> We have an officer arriving on the scene having been dispatched for a high priority call. He is on full alert. He is going into a well[-]lit area, his eyesight is 20/20 with his contacts which he was wearing that evening. He saw an individual running with a towel approximately sixty yards or fifty yards away from him. That'll be about 160 feet, 175 feet.
>
> He believes that individual was actually proceeding to the location where the injured individual may need to provide aid, and follows that individual and loses sight of him in the breeze way [sic]. Eventually[,] the officer, along with other officers, come across the victim who was allegedly shot twice in the head. They began looking for another victim, who then provided the information of names.
>
> The officer proceeds to continue his investigation using an electronic database in his patrol car, which includes identification photographs of individuals that are in that database. When he brings up the defendant's name, a picture comes up as well. It's after that point he connects the identity of the defendant with the person he saw in the parking lot.
>
> That officer is doing good police work and investigating a crime scene which is part of his official capacity. Therefore, I believe that as to the photograph itself, that the statement in *Macon* where the court indicated that they did not believe the legislature intended to prevent police officers from consulting a photograph in a database to follow up on leads that are given by other officers, or in this case also a

> victim. And they upheld the court's decision that the EIRA did not apply here.

Upon review of Officer Potter's testimony, we agree with the trial court that the EIRA does not apply to his identification of defendant. Officer Potter testified in detail that when he arrived at Cherry's apartment complex, he saw a black male, wearing a green t-shirt, and carrying a white towel approximately 60 yards away. Officer Potter interviewed Cherry, who issued a detailed statement and description of the suspect—she identified defendant by name and age. That information—defendant's name, physical description, and date of birth—was used by Officer Potter to locate registered vehicles for the purposes of issuing a BOLO. As Officer Potter searched through the CJLeads database, defendant's DMV photograph appeared and Officer Potter learned for the first time that defendant was the man he saw when he arrived at Cherry's apartment complex. Officer Potter testified that he was "100 percent" certain he could identify the man even if defendant's DMV photograph was suppressed as evidence.

Even assuming Officer Potter's viewing of defendant's DMV photograph was somehow inherently suggestive, defendant has not demonstrated that, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. *See State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983) ("Identification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification.").

> The factors to be considered in evaluating the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Id. at 164, 301 S.E.2d at 95.

Officer Potter responded to a high-priority dispatch to investigate a crime. He was in a well-lit area, had clear 20/20 vision with contacts, and a clear, unobstructed view of a man running about "sixty yards or fifty yards away from him." He was able to see a man, wearing a green shirt, and carrying a white towel. Prior to viewing defendant's photograph,

Officer Potter did not give a description of the man as he was not a suspect at that time. In fact, Officer Potter testified with "100 percent" certainty that he could identify the man as it was an "instantaneous reaction" upon seeing the photograph. Further, the length of time between Officer Potter seeing defendant in person and seeing his DMV photograph in CJLeads was less than an hour.

Based on the circumstances, there is neither evidence that viewing the photograph was inherently suggestive or that Officer Potter's viewing of the photograph created a substantial likelihood of irreparable misidentification. Officer Potter's identification at the scene was clearly independent of his viewing of defendant's photograph, and thus, there was no error by the trial court in admitting his testimony. *See State v. Macon*, 236 N.C. App. 182, 191, 762 S.E.2d 378, 383 (2014) (holding that an officer's identification of a suspect would be admissible if the identification "had an origin independent of the impermissible procedure.").

II

[2] Defendant also argues the trial court erred by allowing Agent Sutton to testify as an expert witness, and refer to the report of Agent Warren, who was unavailable to testify. Specifically, defendant contends the trial court violated his constitutional right to confront his witness.[2] We disagree.

Our courts have consistently held that an expert witness may testify as to the testing or analysis conducted by another expert if: (i) that information is reasonably relied on by experts in the field in forming their opinions; and (ii) the testifying expert witness independently reviewed the information and reached his or her own conclusion in this case. *See State v. Brewington*, 367 N.C. 29, 32, 743 S.E.2d 626, 628 (2013) (holding that the defendant's rights were not violated when testifying witness gave an opinion based on her own analysis of a lab report prepared by another analyst); *see also State v. Ortiz-Zape*, 367 N.C. 1, 9, 743 S.E.2d 156, 161 (2013) (holding that Confrontation Clause was not violated by the admission of expert's independent opinion based on testing that was conducted by another analyst). Our Supreme Court in *State v. Ortiz-Zape* stated:

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2. Defendant also contends that because he was not provided an expert report from Agent Sutton, he was unable to effectively cross-examine him. Defendant was given prior notice that Agent Sutton would testify in place of Agent Warren and he was given an opportunity to use Agent Warren's report during cross-examination of Agent Sutton to challenge the underlying basis of his opinion. Thus, we reject defendant's contention of a potential discovery violation as it is without merit.

> [W]hen an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert.

367 N.C. at 9, 743 S.E.2d at 161 (internal citation and quotation marks omitted).

Here, Special Agent Warren, who was unavailable to testify, had performed a cell site analysis and created a report of the data. The State called Agent Sutton, an expert in the field of historical cell site analysis and cellular technology, and he was tendered as an expert without objection from defendant. During his direct examination, Agent Sutton testified about the procedures in cell site analysis:

> [PROSECUTOR]: Can you tell the jury how a peer review is completed?
>
> [AGENT SUTTON]: With all of our cases when the CAST expert conducts an analysis, before we put the final stamp of approval on that, a second expert has to review that information and concur. So a completely independent analysis of the call detail records and the ultimate conclusions has to be done. And then at that point[,] the report is submitted as final.
>
> [PROSECUTOR]: Were you asked to review [Agent Warren's] cell phone analysis for this case?
>
> [AGENT SUTTON]: Yes.
>
> [PROSECUTOR]: Did you do that?
>
> [AGENT SUTTON]: I did.
>
> [PROSECUTOR]: And did you independently check the information in his cell site analysis to verify that it is correct and accurate?

[AGENT SUTTON]: I did.

[PROSECUTOR]: Is it correct and accurate?

[AGENT SUTTON]: It is.

[PROSECUTOR]: Is it fair to say that you essentially did another peer review on it?

[AGENT SUTTON]: That is exactly what I did.

[PROSECUTOR]: Is [sic] your analysis and conclusions the same as Special Agent Warren's?

[AGENT SUTTON]: They are.

Defendant's argument that the admission of Agent Sutton's testimony regarding Agent Warren's report violated his constitutional right to confront his witness is without merit. The record supports that Agent Sutton gave his independent opinion about the process of reviewing cellphone data recorded by network carriers and utilizing cellphone towers to determine the location of defendant's phone in relation to Cherry's apartment around the time of the incident. His testimony provided insight as to the practice of cell site analysis and the peer review process, which he used to formulate his independent opinion separate from that of Agent Warren prior to the submission of the final report. It is also clear from the record that defendant was given ample opportunity to cross-examine Agent Sutton as to the report created by Agent Warren as well as Agent Sutton's own independent expert opinion. Accordingly, the trial court did not err in admitting Agent Sutton's testimony.

NO ERROR.

Judges STROUD and COLLINS concur.

STATE v. GREEN

[266 N.C. App. 382 (2019)]

STATE OF NORTH CAROLINA
v.
JAMES BROWN GREEN, JR.

No. COA18-1114

Filed 16 July 2019

1. Sentencing—prior record level—calculation—stipulation—possession of drug paraphernalia—facts underlying conviction

The trial court properly counted defendant's 1994 possession of drug paraphernalia conviction as a Class 1 misdemeanor when calculating his prior record level. Even though under the new statutory scheme the conviction could have been a Class 1 or Class 3 misdemeanor (depending on whether it involved marijuana or non-marijuana paraphernalia), defendant's stipulation to the Class 1 misdemeanor classification also served as a stipulation that the facts underlying the conviction justified the classification (in other words, that the conviction was for possession of non-marijuana paraphernalia).

2. Sentencing—prior record level—calculation—stipulation—evidence inconsistent with stipulation

The trial court erred in calculating defendant's prior record level by assigning his 1993 maintaining a vehicle/dwelling conviction two points instead of one. Even though defendant stipulated that the conviction warranted a Class I felony classification, the judgment (which was before the trial court) clearly showed that the conviction was a misdemeanor.

3. Sentencing—prior record level—calculation—stipulation—evidence inconsistent with stipulation

The trial court erred by counting defendant's 1993 carrying a concealed weapon conviction as a Class 1 misdemeanor in calculating his prior record level where defendant stipulated to the classification but the applicable statute provided that a defendant's first offense was a Class 2 misdemeanor and a second offense was a Class H felony. Even though the Court of Appeals could conceive of a scenario in which an offense labeled as "carrying concealed weapon" could be a Class 1 misdemeanor (under a different statute), the parties stipulated that the applicable statute was N.C.G.S. § 14-269(c), which did not provide for any violation of its provisions to be classified as a Class 1 misdemeanor.

4. Sentencing—prior record level—calculation—stipulation—erroneous classification—remedy

Where defendant stipulated as part of a plea agreement to prior convictions that were erroneously classified, resulting in an incorrect finding of his prior record level, the appropriate remedy was for the plea agreement to be set aside in its entirety, with the parties having the option to enter a new plea agreement or proceed to trial on the original charges.

Appeal by Defendant from Judgment entered 24 April 2018 by Judge John E. Nobles, Jr. in Craven County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany K. Brown, for the State.

Winifred H. Dillon, Attorney at Law, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

James Brown Green, Jr. (Defendant) appeals from his convictions for Possession of a Firearm by a Felon, Possession with Intent to Sell/Deliver Cocaine (PWISD Cocaine), Possession of Drug Paraphernalia, and having attained the status of a Habitual Felon. Relevant to this appeal, the Record before us tends to show the following:

On 7 August 2017, a Craven County Grand Jury returned true Bills of Indictment charging Defendant with one count of PWISD Cocaine, Possession of Drug Paraphernalia, Possession of a Firearm by a Felon, and attaining Habitual-Felon status. Pursuant to a plea agreement, Defendant entered an *Alford* plea[1] to all four charges on 24 April 2018. As recorded on the Transcript of Plea, the parties' plea agreement provided that Defendant's offenses would be consolidated for judgment into one habitual-felon sentence and that Defendant would receive an "active sentence of 87–117 months bottom mitigated."

Defendant stipulated to a Prior-Record-Level Worksheet (Worksheet) presented by the State that listed Defendant's prior convictions in North Carolina. The Worksheet disclosed a total of 19 points, making

1. *See North Carolina v. Alford*, 400 U.S. 25, 37-39, 27 L. Ed. 2d 162, 171-72 (1970) (allowing a defendant to plead guilty while maintaining his factual innocence).

Defendant a prior-record level VI offender for sentencing purposes. Relevant to this appeal, the Worksheet listed three prior convictions that Defendant contends were erroneously classified: (1) 1994 Possession of Drug Paraphernalia, classified as a Class 1 misdemeanor; (2) 1993 Maintaining a Vehicle/Dwelling for the use or storage of controlled substances, classified as a Class I felony; and (3) 1993 Carrying Concealed Weapon, classified as a Class 1 misdemeanor. The State also submitted, as exhibits, copies of three prior judgments, which were used for the Habitual-Felon Indictment. One of these judgments showed that the 1993 Maintaining-a-Vehicle/Dwelling conviction constituted a violation of N.C. Gen. Stat. § 90-108. According to this judgment, the conviction was classified as a misdemeanor but did not include the specific class of misdemeanor.

After conducting a plea colloquy with Defendant and after hearing the Prosecution's summary of the factual basis for the plea, the trial court accepted Defendant's *Alford* plea. The trial court then sentenced Defendant to the agreed-upon prison term of 87 to 117 months, which was in the mitigated range based on Defendant's class of offense and prior-record level as calculated on the Worksheet. Defendant timely filed his Notice of Appeal on 30 April 2018.

Jurisdiction

Defendant's appeal is properly before this Court pursuant to Section 15A-1444(a2)(1) of our General Statutes. *See* N.C. Gen. Stat. § 15A-1444(a2)(1) (2017) (providing "[a] defendant who has entered a plea of guilty . . . is entitled to appeal as a matter of right the issue of whether the sentence imposed . . . [r]esults from an incorrect finding of the defendant's prior record level").

Issue

The sole issue on appeal is whether the trial court erred in calculating Defendant's prior-record level by (1) including Defendant's 1994 Possession-of-Drug-Paraphernalia conviction in Defendant's prior-record-level calculation; (2) classifying Defendant's 1993 Maintaining-a-Vehicle/Dwelling conviction as a Class I felony; and (3) counting Defendant's 1993 Carrying-Concealed-Weapon conviction as a Class 1 misdemeanor.[2]

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2. Although Defendant did not object to the trial court's prior-record-level calculation, we note this issue is automatically preserved for appellate review pursuant to our General Statutes and established case law. *See* N.C. Gen. Stat. § 15A-1446(d)(18) (2017); *see also State v. Meadows*, 371 N.C. 742, 747, 821 S.E.2d 402, 406 (2018) (recognizing arguments "that '[t]he sentence imposed was unauthorized at the time imposed, exceeded the

Analysis

I. Standard of Review

"The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *Bohler*, 198 N.C. App. at 633, 681 S.E.2d at 804 (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

II. Prior-Record Level

Generally, "[t]he prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions[.]" N.C. Gen. Stat. § 15A-1340.14(a) (2017). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." *Id.* § 15A-1340.14(f). "In determining [a defendant's] prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed." *Id.* § 15A-1340.14(c). Standing alone, a sentencing worksheet prepared by the State listing a defendant's prior convictions is insufficient proof of those convictions. *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005). Rather, prior convictions can be proven by any of the following methods:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

Id. § 15A-1340.14(f)(1)-(4).

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maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law' " are statutorily preserved (citing N.C. Gen. Stat. § 15A-1446(d)(18))); *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) ("It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." (citations omitted)).

Here, the trial court, relying on the parties' stipulations, sentenced Defendant as a prior-record level VI with 19 prior-record-level points based on eight prior convictions. Defendant contends three of his prior convictions were wrongly calculated. Although neither the State nor Defendant has pointed us to *State v. Arrington*, we believe this precedent instructs our analysis in this case where Defendant stipulated to his prior-record level. *See* 371 N.C. 518, 819 S.E.2d 329 (2018). However, this case also illustrates certain challenges in the application of *Arrington*, such as where the underlying record shows a stipulation to be in error or where the stipulation is to a classification for an offense that conflicts with the actual classification in the applicable criminal statute.

Our Court recently summarized the Supreme Court's decision in *Arrington*:

> In *Arrington*, the defendant entered a plea agreement and stipulated to a sentencing worksheet showing his prior offenses, including a second-degree murder conviction designated as a B1 offense. [*State v. Arrington*, 371 N.C. 518,] 519, 819 S.E.2d [329,] 330 [(2018)]. The defendant's second-degree murder conviction stemmed from acts committed prior to 1994; however, the Legislature did not divide this crime into two classifications, B1 and B2, until after the defendant's 1994 conviction. *Id.* at 522-25, 819 S.E.2d at 332-34. Thus, the defendant's second-degree murder conviction could have been classified as a B1 or B2 offense, depending on certain factual circumstances existing at the time of the murder; however, the defendant did not explain the factual underpinnings of his conviction and merely stipulated to the B1 classification. *Id.* at 520-21, 819 S.E.2d at 330-31. This Court vacated the trial court's judgment and held that this determination—whether the second-degree murder conviction should be classified as a B1 or B2 offense for sentencing purposes—constituted a legal question to which the defendant could not stipulate. *Id.* at 521, 819 S.E.2d at 331 (citation omitted).
>
> Our Supreme Court reversed this Court, reasoning that "[e]very criminal conviction involves facts (i.e., what actually occurred) and the application of the law to the facts, thus making the conviction a mixed question of fact and law." *Id.* "Consequently, when a defendant stipulates to a prior conviction on a worksheet, the defendant is admitting that certain past conduct constituted a

> stated criminal offense." *Id.* at 522, 819 S.E.2d at 331. "By stipulating that the former conviction of second-degree murder was a B1 offense, defendant properly stipulated that the facts giving rise to the conviction fell within the statutory definition of a B1 classification." *Id.* at 522, 819 S.E.2d at 332. "Thus, like a stipulation to any other conviction, when a defendant stipulates to the existence of a prior second-degree murder offense in tandem with its classification as either a B1 or B2 offense, he is stipulating that the facts underlying his conviction justify that classification." *Id.* at 524, 819 S.E.2d at 333. Our Supreme Court further acknowledged that "[s]tipulations of prior convictions, including the facts underlying a prior offense and the identity of the prior offense itself, are routine[,]" and that because a defendant is "the person most familiar with the facts surrounding his offense, . . . this Court need not require a trial court to pursue further inquiry or make defendant recount the facts during the hearing." *Id.* at 526, 819 S.E.2d at 334 (citation omitted).

State v. Salter, ___ N.C. App. ___, ___, 826 S.E.2d 803, 808 (2019).

In both *Arrington* and *Salter*, the respective defendants stipulated to classifications of prior offenses that were supported, at least at some level, by the applicable existing criminal statutes defining those offenses. In *Arrington*, our Supreme Court held the defendant stipulated to the existence of facts converting his prior second-degree murder conviction into a Class B1 offense. In *Salter*, applying *Arrington*, we held Defendant could stipulate to a factual underpinning that supported converting his no-operator's-license violation into a Class 2 misdemeanor under the applicable statutes. The case currently before us presents three additional scenarios implicating *Arrington*: first, where *Arrington* most clearly applies; second, where *Arrington* should not apply; and third, where *Arrington* could apply.

A. 1994 Possession-of-Drug-Paraphernalia Conviction

[1] Defendant first argues the trial court erred in counting his 1994 Possession-of-Drug-Paraphernalia conviction as a Class 1 misdemeanor. Prior to 2014 and thus at the time of Defendant's 1994 Possession-of-Drug-Paraphernalia conviction, our General Statutes only contained one classification for possession of drug paraphernalia—Class 1 misdemeanor; however, in 2014, our Legislature divided possession of drug paraphernalia into two offenses. *See* 2014 N.C. Sess. Law 119,

§ 3 (N.C. 2014). Under this new statutory scheme, possession of *marijuana* paraphernalia is a Class 3 misdemeanor; whereas, possession of *non-marijuana* drug paraphernalia remains a Class 1 misdemeanor. *Compare* N.C. Gen. Stat. § 90-113.22A (2017) (possession of marijuana paraphernalia), *with id.* § 90-113.22 (2017) (possession of non-marijuana drug paraphernalia). Defendant contends that because "the State presented no evidence that [Defendant's] prior conviction for possession of drug paraphernalia . . . was for non-marijuana paraphernalia[,]" this conviction should not have been included in his prior-record-level calculation. *See id.* § 15A-1340.14(b)(5) (excluding Class 3 misdemeanors from a defendant's prior-record-level calculus). We, however, disagree and conclude *Arrington* controls, as Defendant's stipulation falls within *Arrington*'s ambit.

Here, on the Worksheet, Defendant—as "the person most familiar with the facts surrounding his offense"—stipulated that his 1994 Possession-of-Drug-Paraphernalia conviction was classified as a Class 1 misdemeanor. *Arrington*, 371 N.C. at 526, 819 S.E.2d at 334 (citation omitted). Thus, Defendant was "stipulating that the facts underlying his conviction justify that classification." *Id.* at 524, 819 S.E.2d at 333. Therefore, under *Arrington*, we conclude there was no error in the trial court's inclusion of one record point based on Defendant's stipulation to the 1994 Possession-of-Drug-Paraphernalia conviction being classified as a Class 1 misdemeanor. *See id.*

Defendant contends *State v. McNeil* requires a different result. *McNeil* held: "Where the State fails to prove a pre-2014 possession of paraphernalia conviction was for non-marijuana paraphernalia, a trial court errs in treating the conviction as a Class 1 misdemeanor." ___ N.C. App. ___, ___, 821 S.E.2d 862, 863, *temporary stay allowed*, ___ N.C. ___, 820 S.E.2d 519 (2018). However, there is a crucial distinction between *McNeil* and the case *sub judice*—the defendant in *McNeil* never stipulated to his prior-record level. *See id.* at ___, 821 S.E.2d at 864 ("During the sentencing hearing, Defendant did not stipulate to his prior convictions, there was no specific mention of the paraphernalia charge, and the only evidence proffered by the State was a certified copy of Defendant's DCI Computerized Criminal History Report."); *see also Alexander*, 359 N.C. at 827, 616 S.E.2d at 917 ("There is no doubt that a mere worksheet, standing alone, is insufficient to adequately establish a defendant's prior record level."). Thus, *Arrington* was not applicable to *McNeil*, which in turn has no bearing on the present case.

Here, however, Defendant's stipulation to this conviction's classification is the prototypical situation to which *Arrington* applies. Just

as in *Arrington*, at the time of Defendant's 1994 Possession-of-Drug-Paraphernalia conviction, the governing statute only had one classification for this crime. *See* N.C. Gen. Stat. § 90-113.22 (1993) (listing all types of possession-of-drug-paraphernalia violations as a Class 1 misdemeanor); *see also Arrington*, 371 N.C. at 522, 819 S.E.2d at 332 (explaining that at the time of the defendant's 1994 second-degree murder conviction, "all second-degree murders were classified at the same level for sentencing purposes" (citation omitted)). Again, just as in *Arrington*, the Legislature subsequently divided this crime into two different classifications depending on the type of drug paraphernalia possessed. *See* 2014 N.C. Sess. Law 119, § 3 (N.C. 2014) (creating two types of possession-of-drug-paraphernalia crimes with differing classifications for sentencing purposes); *see also Arrington*, 371 N.C. at 522-23, 819 S.E.2d at 332 (explaining the Legislature's 2012 division of second-degree murder into two separate classifications for sentencing purposes). Thereafter, Defendant was convicted of a new crime and during sentencing stipulated that his prior Possession-of-Drug-Paraphernalia conviction qualified for the higher classification for sentencing. Therefore, just as in *Arrington*, Defendant could and did stipulate that this classification was proper. *See id.* at 527, 819 S.E.2d at 335 (upholding the defendant's stipulation that his prior second-degree murder conviction constituted a Class B1 conviction, which was the higher of the two classifications). For this reason, Defendant's Possession-of-Drug-Paraphernalia conviction fits squarely within *Arrington*.

B. 1993 Maintaining-a-Vehicle/Dwelling Conviction

[2] Defendant also challenges the trial court's calculation of his 1993 Maintaining-a-Vehicle/Dwelling conviction. Specifically, Defendant contends the trial court committed error by assigning two points, instead of one, to the 1993 Maintaining-a-Vehicle/Dwelling conviction. The Worksheet shows the trial court counted this conviction as a Class I felony. However, Defendant points out that the judgment for this conviction, which was submitted by the State at the sentencing hearing, shows this conviction constituted a violation of N.C. Gen. Stat. § 90-108 and was classified as a misdemeanor, although no specific class was designated.

Section 90-108 of our General Statutes sets the penalty for maintaining a vehicle or dwelling for keeping controlled substances and provides three possible classifications of this crime for sentencing purposes—Class 1 misdemeanor, Class I felony, or Class G felony. N.C. Gen. Stat. §§ 90-108(b), -108(b)(1)-(2) (2017).

Here, Defendant stipulated that this conviction warranted a Class I felony classification for sentencing purposes; however, the judgment, which was before the trial court, clearly shows that Defendant's conviction was a misdemeanor. Although certain language from *Arrington* suggests Defendant's stipulation could be proper,[3] we determine *Arrington* does not apply where there is clear record evidence demonstrating the parties' stipulation was an error or mistaken. Thus, when evidence (such as a certified copy of the judgment) is presented to the trial court conclusively showing a defendant's stipulation is to an incorrect classification—as is the case here—*Arrington* does not apply, and a reviewing court should defer to the record evidence rather than a defendant's stipulation.

We find support for this position from the plain language of the governing statute. Section 15A-13.40.14(f) places the burden of proof on the State to establish a defendant's prior convictions, including the requirement: "The prosecutor shall make all feasible efforts to obtain and present to the court the offender's full record." N.C. Gen. Stat. § 15A-1340.14(f). The statute also expresses an evidentiary preference for such records:

> The original or a copy of the court records or a copy of the records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true.

Id.

Here, because the Record in this case, including evidence presented to the trial court, discloses that Defendant's 1993 Maintaining-a-Vehicle/Dwelling conviction was a misdemeanor and as Section 90-108 only has one misdemeanor classification (Class 1), the trial court erred by assigning two points, instead of one, to this conviction.

C. 1993 Carrying-Concealed-Weapon Conviction

[3] Lastly, Defendant asserts the trial court erred in counting his 1993 Carrying-Concealed-Weapon conviction as a Class 1 misdemeanor. Here,

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3. *See Arrington*, 371 N.C. at 526, 819 S.E.2d at 334 (explaining that once a defendant stipulated to a prior conviction's classification, a trial court need not "pursue further inquiry or make defendant recount the facts during the [sentencing] hearing" (citation omitted)).

again, Defendant's Worksheet lists his conviction for "Carrying Concealed Weapon" as a Class 1 misdemeanor, and Defendant stipulated to this classification. On appeal, Defendant points us to Section 14-269(c) of our General Statutes, titled "Carrying concealed weapons[,]" which provides that a defendant's first carrying-concealed-weapon offense is a Class 2 misdemeanor, while a second offense is considered a Class H felony. N.C. Gen. Stat. § 14-269(c) (2017). The State does not contest that this is the applicable statute.

Defendant argues because the Worksheet does not list any convictions for carrying concealed weapon prior to the 1993 conviction, "this prior conviction was incorrectly counted, and one prior record point [was] incorrectly assessed." The State claims the classification of this offense depends on a question of fact—"whether the 1993 carrying a concealed weapon conviction was Defendant's first offense"—to which Defendant could and did stipulate.

As discussed *supra*, however, Section 14-269(c) provides only two classifications for a violation of its provisions—either a Class 2 misdemeanor or Class H felony. Defendant, however, stipulated that his conviction was a Class 1 misdemeanor, which is impossible under this statute.

Here is where *Arrington* creates a conundrum for a reviewing court. While the State offers no statutory support for this stipulation, our own research reveals there is a possible, albeit convoluted, factual scenario under which Defendant could have been convicted of a Class 1 misdemeanor for an offense that could be referred to in shorthand as "Carrying Concealed Weapon." Specifically, Section 14-415.21(a1) of our General Statutes provides: "A person who has been issued a valid [concealed-carry] permit who is found to be carrying a concealed handgun in violation of subsection (c2) of [N.C. Gen. Stat. §] 14-415.11 shall be guilty of a Class 1 misdemeanor." N.C. Gen. Stat. § 14-415.21(a1) (2017). In turn, Section 14-415.11(c2) prohibits the carrying of a concealed handgun while consuming alcohol. *Id.* § 14-415.11(c2) (2017). Therefore, a scenario exists under which Defendant's stipulation could be possible and thus upheld under *Arrington* and *Salter*, where we found statutory support for the classification of the offense under the applicable statutes. However, we do not believe the intent of *Arrington* was to require a reviewing court to undertake *sua sponte* a voyage of discovery through our criminal statutes to locate a possibly applicable statute and imagine factual scenarios in which it could apply. Rather, we defer to the parties who stipulated to the prior conviction as to what statute applies. Therefore, because Section 14-269 does not provide for a violation of

its provisions to be classified as a Class 1 misdemeanor, we conclude *Arrington* is inapplicable and that the trial court erred in accepting Defendant's stipulation.

[4] Having determined that Defendant's stipulation was invalid, the only remaining question is the effect of our holding on Defendant's guilty plea. Assuming, as we must on the Record and arguments before us, Defendant is correct in that this prior conviction should have been classified as a Class 2 misdemeanor, the trial court's miscalculation of this conviction and the Maintaining-a-Vehicle/Dwelling conviction (discussed in part B above) was not harmless, as Defendant's prior-record-level points would be reduced to 17, making him a prior-record level V. *See id.* § 15A-1340.14(b)(5) (excluding Class 2 misdemeanors from a defendant's prior-record-level calculus); *cf. State v. Smith*, 139 N.C. App. 209, 220, 533 S.E.2d 518, 524 (2000) (holding that error in calculating prior-record-level points is harmless if it does not affect the ultimate prior-record-level determination).

Defendant, thus, contends we should simply remand for resentencing at prior-record level V. We disagree because Defendant's sentence was imposed as part of a plea agreement, which Defendant has successfully repudiated. Rather, the plea agreement must be set aside in its entirety, and the parties may either agree to a new plea agreement or the matter should proceed to trial on the original charges in the indictments. *See*, *e.g.*, *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting) (concluding judgment should be vacated, guilty plea set aside, and the case remanded for disposition of original charges where trial court erroneously imposed aggravated sentence based solely on defendant's guilty plea and stipulation as to aggravating factor), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012).

Conclusion

Accordingly, for the foregoing reasons, we vacate the Judgment against Defendant and set aside the plea agreement in its entirety. We remand to the trial court for further proceedings on the charges contained in the indictments, including trial, if necessary.

VACATED AND REMANDED.

Judges DILLON and MURPHY concur.

STATE OF NORTH CAROLINA
v.
JOSHUA ELIJAH TINCHER

No. COA18-1174

Filed 16 July 2019

1. Probation and Parole—revocation of probation—concurrent versus consecutive probationary periods—default rule—section 15A-1346

Where a defendant's probation was imposed without specifying whether it ran consecutively or concurrently with an active sentence imposed in another case, the default rule contained in N.C.G.S. § 15A-1346(b) required that the probation run concurrently. Since the probationary period had expired when a violation report was filed, the trial court lacked subject matter jurisdiction to revoke defendant's probation.

2. Contempt—criminal—required findings—opportunity to be heard

A defendant who was held in criminal contempt for using profanity in the courtroom was not given an opportunity to be heard as required by N.C.G.S. § 5A-14(b), rendering the court's order and judgment of contempt deficient. Not only was there no record of the proceeding or any evidence, but the court's striking out of preprinted language on the form order (stating that defendant had notice and an opportunity to respond) established the lack of the required procedural safeguards.

Appeal by Defendant from Judgments entered 16 April 2018 and 17 April 2018 by Judge Julia Lynn Gullett in Randolph County Superior Court. Heard in the Court of Appeals 24 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General David L. Gore, III, for the State.

Michael E. Casterline for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Joshua Elijah Tincher (Defendant) appeals from Judgments revoking his probation. In addition, we grant Defendant's Petition for Writ of *Certiorari* to review the trial court's Order and Judgment holding him in Criminal Contempt. The Record before us shows the following:

On 26 June 2006, Defendant was charged via two indictments. Under each indictment, in cases 06 CRS 51515 and 06 CRS 51521, Defendant was charged with Common Law Robbery and the Statutory Aggravating Factor of committing the offense while on pretrial release on another charge, 06 CRS 51525. On 26 February 2008, Defendant pleaded guilty to these and other charges. At the time the Judgments in question were entered, Defendant was serving an active sentence pursuant to the 06 CRS 51525 Judgment.

In both the 06 CRS 51515 Judgment and the 06 CRS 51521 Judgment, the trial court sentenced Defendant to a minimum of 20 months and a maximum of 24 months' imprisonment and then suspended those sentences in favor of 36 months of supervised probation. In the event that Defendant violated his probation upon the expiration of the active sentence in the 06 CRS 51525 Judgment, the trial court indicated that prison sentences in both the 06 CRS 51515 Judgment and 06 CRS 51521 Judgment were to run consecutively with one another. Additionally, in the 06 CRS 51515 Judgment, the trial court indicated on the Judgment that the 36-month probationary period would begin at the expiration of the active sentence in the 06 CRS 51525 Judgment. However, in the 06 CRS 51521 Judgment, the trial court did not indicate when the 36-month probationary period would begin.

On 8 February 2018, Defendant's Probation Officer, Catherine N. Russell (Officer Russell), filed two Probation-Violation Reports alleging multiple probation violations. As a result, on 16 April 2018, the trial court ultimately entered two Judgments revoking Defendant's probation in 06 CRS 51515 and 06 CRS 51521. In addition, as a result of Defendant's alleged conduct in open court following the probation-revocation proceeding, the trial court entered a Criminal-Contempt Order against Defendant, holding Defendant in Criminal Contempt and ordering him to serve 30 additional days in the custody of the North Carolina Department of Adult Correction. The trial court then entered a Criminal-Contempt Judgment requiring that the Criminal-Contempt sentence run consecutively with Defendant's other sentences upon his revoked probation.

Issues

The dispositive issues in this case are: (I) Whether the trial court lacked subject-matter jurisdiction to revoke Defendant's probation in 06 CRS 51521; and (II) Whether the trial court erred in summarily imposing Direct Criminal Contempt.

Analysis

I. Subject-Matter Jurisdiction

[1] Defendant contends the trial court lacked subject-matter jurisdiction to revoke his probation in the 06 CRS 51521 Judgment because the Probation-Violation Report was filed outside of the probationary period set out in that case. We agree.

A. Standard of Review

"[T]he issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) (citation omitted). "It is well settled that a court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007) (alteration, citation, and quotation marks omitted). "[A]n appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review." *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

B. Probation Revocation

Defendant's probation was revoked in both file 06 CRS 51515 and file 06 CRS 51521 on 16 April 2018. Defendant does not challenge the revocation of probation in 06 CRS 51515. Rather, Defendant asserts the revocation in 06 CRS 51521 was erroneous because the 06 CRS 51521 Judgment did not state that the probation was to run concurrently with the 06 CRS 51515 Judgment's probation or consecutively with the 06 CRS 51525 Judgment's active sentence. Defendant argues, therefore, according to N.C. Gen. Stat. § 15A-1346, the probation ran concurrently with his active prison sentence already in effect in 06 CRS 51525. Defendant contends that because this probation ran concurrently with

his active sentence in 06 CRS 51525, the Parole-Violation Report filed in 06 CRS 51521 was filed after his probationary period had already expired, thereby depriving the trial court of jurisdiction to revoke his probation.

Section 15A-1346 of our General Statutes states:

> (a) Commencement of Probation. — Except as provided in subsection (b), a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period.
>
> (b) Consecutive and Concurrent Sentences. — If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. *If not specified, it runs concurrently.*

N.C. Gen. Stat. § 15A-1346 (2017) (emphasis added). "A careful reading of the statute shows that any sentence of probation must run concurrently with any other probation sentences imposed on a defendant. The only power to adjust the timing of a probation sentence is that found under N.C. Gen. Stat. § 15A-1346(b)." *State v. Canady*, 153 N.C. App. 455, 459-60, 570 S.E.2d 262, 265 (2002) (citation omitted); *see also State v. Cousar*, 190 N.C. App. 750, 757, 660 S.E.2d 902, 906 (2008) (holding that where the trial court entered two active sentences and five suspended sentences and the judgment states the five suspended sentences, *if activated*, run consecutively with the two active sentences but does not specify whether these five *probationary* sentences run concurrently or consecutively with the two active sentences, the five suspended sentences run concurrently with the two active sentences pursuant to *Canady* and N.C. Gen. Stat. § 15A-1346(b)).

In the instant case, it is undisputed that in the "Suspension of Sentence" section of the Judgment form for 06 CRS 51521, the boxes on Lines 3 and 4, which specify when the period of probation would begin, are not marked or checked. Defendant contends, and we agree, the failure to mark one of these boxes requires us to look at the default rule in N.C. Gen. Stat § 15A-1346. Here, because the boxes have not been marked or checked to alter the default rule under N.C. Gen. Stat. § 15A-1346, the probationary period in the 06 CRS 51521 Judgment ran

concurrently with Defendant's ongoing active sentence from the day it was imposed. *See* N.C. Gen. Stat. § 15A-1346(b); *see also Cousar*, 190 N.C. App. at 757, 660 S.E.2d at 906-07; *Canady*, 153 N.C. App. at 459-60, 570 S.E.2d at 265 (citation omitted).

The State, however, contends the plea agreement in file 06 CRS 51521 —which Defendant, Defendant's trial counsel, and the Prosecutor signed—contained language requiring the probationary period to run at the expiration of the active sentence in file 06 CRS 51525. The State further contends that the trial court provided additional language to show its intent to have the probationary period imposed in the 06 CRS 51521 Judgment run consecutively with Defendant's active sentence by marking a box in the 06 CRS 51521 Judgment that states, "[t]his sentence shall run at the expiration of sentence imposed in file number 06 CRS 51515." Thus, the State asserts that the trial court's failure to mark an additional box in the 06 CRS 51521 Judgment altering the probationary period was a clerical error.

The State directs us to the plea agreement to infer intent because it references the conditions of the suspended active sentences. However, the plea agreement makes no mention that the probationary period in the 06 CRS 51521 Judgment was to run consecutively to the 06 CRS 51525 Judgment's active sentence. Accordingly, the plea agreement itself does not reflect any intention for the probation to run consecutively with the 06 CRS 51525 Judgment or to alter the default rule under N.C. Gen. Stat. § 15A-1346.

Additionally, even assuming the Record before us showed a clerical error, we have limited authority in correcting clerical errors. If the correction of a clerical error affects the substantive rights of a party or if the correction corrects a substantive error, the Court is without authority to make a change. *State v. Harwood*, 243 N.C. App. 425, 429, 777 S.E.2d 116, 119 (2015) (citations omitted). Furthermore, "[w]e have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error." *Id.* (citation and quotation marks omitted). In *Harwood*, on 29 May 2009, the trial court sentenced the defendant on seven different judgments. *Id.* at 426, 777 S.E.2d at 117. The trial court suspended the last five of the seven judgments and placed the defendant on 48 months of probation. *Id.* at 427, 777 S.E.2d at 118. On 11 June 2010, the defendant was released from prison on the first two judgments, and on 27 January 2014, a probation officer filed probation-violation reports. *Id.* The defendant was found to be in violation of his probation, and the trial court revoked probation accordingly. *Id.* On appeal, the defendant contended because the judgments did not

indicate when his probation was to begin, his probation began when judgment was entered, in 2009, and thus expired in 2013, several months before the probation-violation reports were filed. In response, the State argued "this omission was due to a clerical mistake" and requested remand for correction of the mistake. *Id.* at 428-29, 777 S.E.2d at 119. In examining the judgments in *Harwood*, this Court disagreed with the State's contention:

> [E]ven assuming the 2009 trial court made a mistake, we hold that this mistake would be a substantive error, rather than a clerical one. Changing this provision would retroactively extend defendant's period of probation by more than one year and would grant the trial court subject matter jurisdiction to activate five consecutive sentences of 6 to 8 months' imprisonment. Because this provision is substantive, we lack authority to change it[.]

Id. at 430, 777 S.E.2d at 120 (citation omitted). We therefore concluded the State failed to show the trial court intended for probation to run consecutively with his active prison sentence, and even if it had, we lacked the authority to make "such a substantive change to the judgments." *Id.* at 432, 777 S.E.2d at 121 (citation omitted). We further held the trial court lacked subject-matter jurisdiction to revoke the defendant's probation and activate his remaining sentences. *Id.*

As in *Harwood*, we conclude—even assuming *arguendo* the trial court intended Defendant's probations to run consecutively—the error was substantive and changing the 06 CRS 51521 Judgment would retroactively extend Defendant's sentence. Therefore, we lack the authority to change it.

Pursuant to N.C. Gen. Stat. § 15A-1346, Defendant's period of probation in the 06 CRS 51521 Judgment ran concurrently with the active sentence imposed in the 06 CRS 51525 Judgment, not consecutively. As such, it expired prior to the filing of the Probation-Violation Reports, and the trial court lacked subject-matter jurisdiction to revoke Defendant's probation. Accordingly, we vacate the trial court's Judgment revoking probation in 06 CRS 51521.

II. Criminal Contempt

[2] Defendant next contends that the trial court failed to make statutorily required findings of fact to support its summary imposition of direct Criminal Contempt, and in the absence of such findings, Defendant

asserts the summary Criminal-Contempt Order, as well as the later Criminal-Contempt Judgment, was improperly entered.

A. Standard of Review

"A contempt hearing is a non-jury proceeding." *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (2007). "The standard of appellate review for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001) (citations omitted). "The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*." *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007) (citation omitted).

B. Findings of Fact

Pursuant to Section 5A-13(a) of our General Statutes, direct criminal contempt occurs when the act:

> (1) Is committed within the sight or hearing of a presiding judicial official; and
>
> (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and
>
> (3) Is likely to interrupt or interfere with matters then before the court.

N.C. Gen. Stat. § 5A-13(a)(1)-(3) (2017). In addition, "[t]he presiding judicial official may punish summarily for direct criminal contempt according to the requirements of [N.C. Gen. Stat. § 5A-14.]" *Id.* § 5A-13(a). The requirements of N.C. Gen. Stat. § 5A-14 for imposing contempt in a summary proceeding are:

> (a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.
>
> (b) Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary

> opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt.

Id. § 5A-14(a)-(b) (2017).

On 17 April 2018, the trial court entered its Criminal-Contempt Order. In this Order, the trial court found Defendant

> after having his probation revoked, he did yell "f*** them, the motherf***ers." He was standing within clear hearing of the Court. This conduct was such that he should have known it to be improper. His conduct was such that there was no excuse for such conduct.[1]

Below this text, the form normally reads: "The undersigned gave a clear warning that the contemnor's conduct was improper. In addition, the contemnor was given summary notice of the charges and summary opportunity to respond." However, on the form at issue, this language was stricken. As a result of the alleged actions, the trial court sentenced Defendant to 30 days in custody for Criminal Contempt. The trial then entered the Criminal-Contempt Judgment.

State v. Verbal directs our analysis here. 41 N.C. App. 306, 254 S.E.2d 794 (1979). In *Verbal*, the trial court cited the defendant, an attorney, for direct contempt and sentenced him to two days' imprisonment for being late returning from lunch. *Id.* The defendant contended that his alleged behavior was indirect contempt. *Id.* at 307, 254 S.E.2d at 795. However, we did not reach the question of direct or indirect criminal contempt because we held that the trial court failed to follow the proper procedure set out in N.C. Gen. Stat. § 5A-14(b), which requires that a contemnor be given an opportunity to be heard. *Id.* We further held that "it is implicit in this statute that the judicial official's findings in a summary contempt proceeding should clearly reflect that the contemnor was given an opportunity to be heard" and without that finding, the trial court's findings do not support the imposition of contempt. *Id.*; *see also In re Korfmann*, 247 N.C. App. 703, 709, 786 S.E.2d 768, 771 (2016) (holding that even though the appellant had an opportunity to answer the judge's preliminary questions, the judge failed to give the appellant an opportunity to respond to the charge before imposing it, which required vacatur of the trial court's contempt order); *In re Owens*, 128 N.C. App.

1. We have censored the language used in the original Order.

577, 581, 496 S.E.2d 592, 594 (1998) (holding that "the requirements of [N.C. Gen. Stat. § 5A-14] are meant to ensure that the individual has an opportunity to present reasons not to impose a sanction").

In the instant case, there is no record of a summary proceeding taking place or the conduct in question, other than the written Order entered the day after the alleged incident. There also is no evidence that the trial court afforded Defendant the opportunity to respond to the charge or for Defendant to "present reasons not to impose a sanction." *Owens*, 128 N.C. App. at 581, 496 S.E.2d at 594. The fact the trial court expressly struck the provision of the form Order indicating Defendant was given notice and opportunity to be heard is proof, if anything, Defendant was not offered the opportunity to be heard, and the State points us to no evidence to the contrary.

As such, we conclude the Criminal-Contempt Order was facially deficient. We further conclude the Criminal-Contempt Judgment entered upon that Order is likewise deficient, and we reverse it.

Conclusion

For the foregoing reasons, we vacate the trial court's Order revoking Defendant's probation in the 06 CRS 51521 Judgment. We also reverse the trial court's Criminal-Contempt Order and Criminal-Contempt Judgment in 18 CRS 77. Defendant makes no argument concerning the revocation of probation in the 06 CRS 51515 Judgment; therefore, this Judgment remains effective.

VACATED IN PART, REVERSED IN PART, AFFIRMED IN PART.

Judges DILLON and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 JULY 2019)

DEUTSCHE BANK NAT'L TR. CO. v. FERGUSON No. 18-1278	Franklin (17CVS565)	Affirmed
HOLLAND v. PARRISH TIRE CO. No. 18-809	N.C. Industrial Commission (16-707463)	Reversed
HUX v. WILSON No. 18-1188	Catawba (17CVD2363)	Affirmed and Remanded
IN RE C.M. No. 18-1077	Lee (15JA46) (15JA47)	Vacated and Remanded
IN RE D.M.G. No. 18-944	Rockingham (16JT107)	Reversed
IN RE E.M. No. 18-1223	Onslow (16JT170)	Affirmed
IN RE M.C. No. 19-3	Watauga (18JA41)	Reversed and Remanded
IN RE Z.O.S-W. No. 18-1270	Davidson (17JT9)	Affirmed
PAUL v. FATTAH No. 19-47	New Hanover (17CVD3920)	Vacated and Remanded
RHODES v. ROBERTSON No. 18-1253	Buncombe (17CVD3901)	Affirmed
STATE v. AKINS No. 18-743	Hoke (15CRS51909)	No Plain Error in Part; Vacated in Part.
STATE v. CATHCART No. 18-1025	Mecklenburg (14CRS237227)	No Plain Error in Part; No Error in Part; Dismissed in Part.
STATE v. CHARLES No. 18-945	Gaston (16CRS54022)	Dismissed
STATE v. GULLETTE No. 19-43	Mecklenburg (14CRS238731) (15CRS25911)	Affirmed

STATE v. HADDOCK No. 18-923	Edgecombe (16CRS52526)	No prejudicial error.
STATE v. JOHNSON No. 18-719	Chatham (14CRS51852) (17CRS585)	No Error
STATE v. MOODY No. 18-1216	Watauga (17CRS50437)	Affirmed
STATE v. SMALLWOOD No. 18-694	Hertford (16CRS281-83) (16CRS50283)	NO ERROR IN PART, VACATED IN PART, AND REMANDED
STATE v. VINES No. 18-961	Edgecombe (16CRS52668) (17CRS1078)	No Error
STELLA MARE RISTORANTE & PIZZERIA, INC. v. WALL No. 18-1042	Wake (11CVS13969)	Vacated and Remanded

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